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COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC., IN 1970 CRI. L. J. AUGUST

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contusions and abrasions on the child's neck could have been caused due to some pressure being applied at that place. This may be at the time when the delivery took place or even due to the encirclement of the cord. The author finds that when a child is born with the umbilical cord round the neck, it is not uncommon to find injuries on the neck. At page 156, the author quotes an instance where the cord was coiled three times around the neck, passing under right armpit; and upon removing it, three parallel discoloured depressions were distinctly marked. These extended completely around the neck and corresponded to the course taken by the coils. Much reliance cannot therefore be placed on the presence of contusions and abrasions on the child's neck.

17. The snapping of the cord is relied on by the prosecution as a very strong circumstance indicating violence. The doctor has found that the skin in the abdomen was found to have been peeled off and hence according to her, it is quite likely that the cord was snapped from child's navel after the birth. Whether the snapping of the cord was accidental or deliberate, the doctor has not offered any opinion. As already pointed out, the snapping of the cord by accident cannot be ruled out. In the circumstances, I am unable to place any reliance on the fact that contusions and abrasions were found on the neck of the child or that the cord was found snapped. Considering the medical evidence as a whole, I am of the view that it is far too inconclusive to find that death was due to strangulation by intentionally tying the umbilical cord on the neck of the child. Having rejected the alleged confession of the accused as spoken to by P.W. 11 and the oral evidence of P.W. 2 and having found the medical evidence inconclusive, I am satisfied that the conviction of the accused cannot be accepted. The accused is entitled to the benefit of doubt, and should be acquitted. I would allow the Criminal Appeal, set aside the conviction and the sentence imposed on her and set her at liberty.

18. VENKATARAMAN, J.:— I agree that the appellant will have to be acquitted, but I would put my reasoning on some aspects in a different form. At the outset, I agree with my learned brother that it is unsafe to act on the testimony of P.W. 11 that the accused made an extra-judicial confession of the murder. If the accused had made such a confession, P.W. 11, would have referred to it in his forwarding report.

19. So far as the evidence of P. W. 2 is concerned, it seems to me that even when she left the house along with the

accused, she knew that the accused expected to deliver a child and wanted to dispose it of. In this view of the matter, P.W. 2 would be in the position of an accomplice and that is also the view of the learned Sessions Judge. The reasons for my view are these. P.W. 2 admits that previous to that night she had not accompanied the accused for her answering calls of nature, and that during nights they would answer calls of nature even at places near their house. Actually, the evidence of the Circle Inspector of Police (P.W. 15) shows that the place where the dead body was buried was about a furlong from the shed of the appellant. If it was merely for answering calls of nature, P.W. 2 would have asked the accused why it was necessary to go so far. P.W. 2 no doubt states in chief examination that the tank was the usual place where they would go for answering calls of nature, since water was available there. Obviously, P.W. 2 would be interested in suppressing the fact that she was an accomplice, and therefore gave such evidence in chief examination. Further, it is difficult to believe that the appellant had taken M. O. 1, the blouse belonging to P. W. 2's daughter, without the knowledge of P. W. 2. It may be noted that the cross-examination on behalf of the accused was that P.W. 2 has taken M O 1 on coming to know that the accused had developed labour pains. Really, the whole cross-examination proceeds on the basis that it was P.W. 2 who killed the child and wanted to foist the blame on the accused and therefore did not inform anybody. Her conduct in not informing the villagers of what the accused did, according to her, till 10 A.M. fits in with the view that P.W. 2 is really in the nature of an accomplice. She was kept at the police station for two days. If she was a mere innocent witness, why should she have been kept at the police station for two days?

20. My learned brother thinks that the medical evidence has not conclusively established that the child was murdered and that we cannot rule out the possibility of the child having been born dead with the umbilical cord round the neck. With great respect, I am, however, inclined to differ from my learned brother on this aspect. It seems to me that the evidence of P.W. 8, that the child died of asphyxia due to homicidal strangulation with the umbilical cord, must be accepted. The doctor gave three reasons in support of the conclusion: (i) contusions and abrasions were seen all around the neck with a knot in the umbilical cord on the right side of the neck, (ii) on dissection she found the subcutaneous tissues in the neck to be echymosed, (iii) the internal organs were congested. It seems to me that the two facts, viz., the presence of contusions

and abrasions around the neck, and echymosis of the subcutaneous tissues in the neck prove violence and pressure at that place. Those circumstances, taken along with the congestion of the internal organs and the remoteness of the possibility of the child being born dead with the umbilical cord around the neck with a knot, at the time of the birth are sufficient to show that death was due to homicidal violence and strangulation with the umbilical cord and pressure with hands. Though the doctor is not positive, she also says that because the skin of the abdomen was found to be peeled off, it was likely that the cord was snapped from the child's navel after the birth. Modi at page 374 of the Fifteenth Edition (1965) states

"Strangulation — This is also a common form of child murder. During the act of strangulation, far greater violence is used than necessary, and severe marks of abrasions and contusions with extravasation of blood in the soft tissues are usually found on the neck"

Lower down he says:

"Rarely, the natural folds of the skin in the neck of a fat child may resemble the cord marks caused by strangulation, but in that case, no marks of abrasions or any extravasation of blood will be visible on the neck."

21. These passages support the evidence of the doctor that death was due to homicidal strangulation

22. Similarly Taylor, at page 172, of the Twelfth Edition states

"Marks of encirclement by the umbilical cord are seldom clear-cut, for the cord is soft and its "weave" or "twist" of vessels too easily flattened by the pressure of tightening to cause a visible pattern on the skin"

This again suggests, that, where contusions and abrasions are present, as in this case, it is not a case of natural death by encirclement of the umbilical cord prior to birth

23. Apart from the medical evidence itself, we cannot ignore the other pieces of circumstantial evidence in the case which go to show that it was not a case of the child being born dead with the umbilical cord around its neck with a knot. In the first place, the circumstances of the case taken as a whole clearly suggest that the accused and P.W. 2 went to the tank knowing that there would be delivery soon and intending that the child, when born, should be disposed of. Under the circumstances, it seems to me to be too good a coincidence to be true that the child was born dead with the umbilical cord around the neck, relieving the accused and P.W. 2 of the necessity of killing the child. Again, if the child was born dead with the umbilical cord around its neck, there was no need at all

to bury the child. Indeed, one would expect the conduct of the accused and P.W. 2 to be different from what it was if the child was born dead with the umbilical cord around the neck. If that was what happened, we could expect P.W. 2 and the accused not to have buried the child, but to have called somebody to witness the fact that the child was born dead with the umbilical cord around the neck in order to divert the unjustified suspicion which might otherwise fall on them of their having murdered the child. Actually neither P.W. 2 nor the accused opens her mouth till when the matter came to light otherwise by the discovery of the corpse by P.W. 5 and the reporting of the matter to the village Headman by P.W. 1.

24. It would, therefore, follow that between themselves P.W. 2 and the accused murdered the child after it was born alive. But here comes my difficulty, because we cannot completely rule out the possibility of P.W. 2 herself having played a more active part than what she would allege and in fact having been primarily instrumental for the death of the child. The accused herself might have been quite exhausted because of the delivery of the child, and P.W. 2 might have taken the active part in murdering the child and disposing it of. One can no doubt ask whether on this line of reasoning the accused would not be guilty, by invoking Section 34 I.P.C., of having shared with P.W. 2, the intention to murder the child. But, the answer to this question is that that is not the case with which the prosecution came forward, and it would be unfair to the accused to convict her on such a basis when she had no notice at all of such a case. Under such circumstances, it would not be proper or even legal for the Court to alter the conviction of the appellant under Section 302 into one under Section 302 read with Section 34 I.P.C.

25. It is in this view of the matter that I agree that the appellant will have to be acquitted

Appeal allowed

1970 CRI. L. J. 1026 (Vol. 76, C. N. 287)

(ALLAHABAD HIGH COURT)

(LUCKNOW BENCH)

O. P. TRIVEDI J.

Daya Ram Das, Appellant v. Raja Ram, and others, Respondents.

Criminal Reference No. 24 of 1968, D/- 4-12-1969, made by S. J., Faizabad, D/- 14-8-1967.

(A) Criminal P. C. (1898), S. 435 — Powers of Sessions Judge under — Cannot

CN/DN/A875/70/BDB/D

reappraise evidence himself — Cannot interfere unless error of procedure or law has caused substantial miscarriage of justice—Where material evidence has been ignored finding of fact can also be interfered with. (Para 3)

(B) Criminal P. C. (1898), S. 145 (6)—Recent possession—No recent decision on “possession” of disputed land by Civil Court — Sessions Judge cannot interfere with Magistrate’s finding on “possession”—Even if there is recent decision of Civil Court about possession, Magistrate must find who was in actual possession during relevant period.

Where there is no recent decision of a competent Court on the question of possession, the Sessions Judge commits an error in interfering with the finding of fact recorded by the Magistrate on the question of possession. Even if there was a recent decision of a competent Court between the parties on the question of possession even then the Magistrate is bound to decide whether on the basis of that decision it could be found which party was in possession on the date of the preliminary order or within two months before it. If the decision of the competent Court on the question of possession does not cover that period then the Magistrate would be free to record his own finding on the question of possession, for not unoften it happens that before the two months period provided under sub-section (4) of section 145 possession of the parties may have been adjudicated upon by a competent Court but still one of the parties may refuse to abide by the decision and take the law into its own hands and interfere with the possession of the other party. When such is the situation it may be a case of a dispute likely to lead to the apprehension of breach of peace. It is the duty of the Magistrate to prevent such breach of peace by taking action under section 145 of the Code. AIR 1953 All 383 & Cri. Revn. No. 343 of 1961, D/- 7-12-1962 (All) Disting. 1968 All L J 1018 & A I R 1956 All 81, Rel. on. (Para 3)

Cases Referred : Chronological Paras

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| (1963) 1968 All L J 1018=1969 All W R (HC) 199, Jafar Hussain v. State | 4 |
| (1962) Criminal Revn. No. 343 of 1961, D/- 7-12-1962 (All), Smt. Sampata v. Sahdeo | 3 |
| (1956) AIR 1956 All 81 (V 43)=1955 All W R (HC) 654=1956 Cri L J 168, Mst. Hasnaker v. State | 4 |

(1953) A I R 1953 All 383 (V. 40)=
1953 Cri L J 832, Masih-uddin v. State

3

R. N. Shukla and B. L. Shukla, for Applicant; S. S. Sharma and S. R. Dwivedi, for Opposite Parties.

ORDER.—This reference has been made by the Temporary Sessions Judge, Faizabad recommending that an order passed by the Magistrate under section 145 (6), Code of Criminal Procedure dated 30-4-1965 may be set aside and possession of the disputed plots be delivered to the applicant before him, Daya Ram Das.

2. Raja Ram Das opposite party filed an application under section 145, Code of Criminal Procedure before the Magistrate that he is in possession of the disputed land and that Daya Ram Das applicant had been interfering with his possession. The Magistrate called for a report from the police which submitted its report to the Magistrate confirming that there was an apprehension of breach of peace between Daya Ram Das and Raja Ram Das. Thereupon the Magistrate passed a preliminary order under S. 145 (1) of the Code on 15-1-1965 directing at the same time attachment of the disputed land. The parties filed written statements and affidavits in support of their respective claims as regards possession and on 30-4-1965 the Magistrate passed a final order under section 145 (6) of the Code holding Raja Ram Dass Sarbarahkar of Sri Thakur Ji in possession of the disputed plots and entitled to retain such possession until ousted in due course of law and forbade the applicant Daya Ram Das from interfering with the possession of the opposite party. The plots were accordingly ordered to be released in favour of Raja Ram Das. Against this order Daya Ram Das filed a revision which was heard by the temporary Civil and Sessions Judge who has recommended the setting aside of the order of the Magistrate on the ground that Daya Ram Das was in his view all along in possession and not Raja Ram Das and that the Magistrate was wrong in recording the conclusion that Raja Ram Das was in possession.

3. After hearing the learned counsel for the parties and on a perusal of the judgment of the Civil and Sessions Judge and the explanation of the Magistrate I am of the opinion that this reference cannot be accepted. The reference was based on the case of Masih Uddin v. State, A I R 1953 All 383 and an unreported decision of this Court in Criminal Rev. No. 343

of 1961 (All.), Smt. Sampata v. Sahdeo decided on 7th December 1962. The Civil and Sessions Judge improperly interfered with the finding of fact recorded by the Magistrate. A Sessions Judge cannot review a finding of fact recorded by a lower Court and cannot enter into a reappraisal of the evidence himself. A Sessions Judge cannot interfere in revision when according to him there is an error on a question of fact. He can do so only in cases where there is an error of procedure or law causing substantial miscarriage of justice. Of course a finding of fact can be interfered with if material evidence has been ignored by the lower Court but in this case it cannot be said that any material evidence bearing on the question of possession which was before the Magistrate was ignored or not considered by the Magistrate. The Civil and Sessions Judge appears to have proceeded on the basis that there was past litigation in the civil Court between Purshottam Dass and Raja Ram Dass leading to a decree from the Court of Munsif in favour of Purshottam Dass and delivery of possession of the disputed land to Purshottam Dass in the year 1963. The litigation between Purshottam Dass and Raja Ram Dass on the question of title or possession was not recent and therefore it was not relevant for the Magistrate to consider the decree or orders passed in connection with any such litigation. Even the Dakhal Dehani in favour of Purshottam Dass took place in the year 1963 whereas the dispute between Daya Ram Dass and Raja Ram Dass arose in the year 1965. Under Sub-section (4) of S. 145 of the Code the duty of the Magistrate is to decide which party was in possession on the date of the preliminary order which in this case was 15-1-1965 or within two months next before such date. It cannot be said therefore that there was any recent decision of the civil Court on that question. The Dakhal Dehani related to the year 1963 and therefore no decision on the question who was in possession on the date of the preliminary order or within two months prior to it could be based possibly on the Dakhal Dehani of 1963. Besides, the previous litigation in the civil Court was not between the same parties but between Purshottam Dass and Raja Ram Dass. No doubt Daya Ram Dass laid claim to the land in dispute as a legatee of Purshottam Dass but Raja Ram Dass never admitted that Purshottam Dass had executed a will in favour of Daya Ram Dass. Con-

sequently it could not even be presumed that on the death of Purshottam Dass, Daya Ram Dass entered into possession of the disputed land as legatee of Purshottam Dass. Documents relating to the previous litigation and the Dakhal Dehani of 1963 were therefore wholly irrelevant material for purposes of the limited enquiry on the question of possession which was before the Magistrate. In the case of A I R 1953 All 383 (supra) it was observed -

"It is the duty of the Magistrate holding proceedings under S. 145 to maintain the rights of the parties when such rights have been declared by a competent Court within a time not remote from taking proceedings under the section."

The ruling clearly does not apply as in this case firstly the rights of the parties had not been adjudicated upon by a competent Court and secondly there was no such adjudication within a time not remote from taking proceedings under this section, or in other words there was not recent decision of the civil Court between the parties on the question of possession. The decision of this Court in Criminal Revision No. 343 of 1961 (All) (supra) for like reasons did not apply. In that case the dispute giving rise to the proceedings under S. 145 of the Code arose between the parties on 27-9-1960. The Court of Munsif had decided in a decree between the parties on 23-11-1959 that Smt. Sampatta, one of the parties to the dispute, was sirdar of the land and in possession of the plots. The matter was taken in appeal to the Additional Civil Judge who affirmed the decision of the Munsif on 10-1-1961, that is to say, during the pendency of the proceedings under section 145, Code of Criminal Procedure. It was therefore clear there was a recent decision of the civil Court declaring one of the parties to the dispute as being in possession and it was for this reason that it was held by this Court in the said criminal revision that the Magistrate was wrong in directing delivery of possession of the plots in dispute to a party other than Smt. Sampatta.

Here there has been no such recent decision of a competent Court on the question of possession and therefore the Civil and Sessions Judge was in error in interfering with the finding of fact recorded by the Magistrate on the question of possession relying upon those two decisions of this Court and basing his final

order on the upshot of the litigation between Purshottam Dass and Raja Ram Dass. Even if there was a recent decision of a competent Court between the parties on the question of possession even then the Magistrate was bound to decide whether on the basis of that decision it could be found which party was in possession on the date of the preliminary order or within two months before it. If the decision of the competent Court on the question of possession did not cover that period then the Magistrate would have been free to record his own finding on the question of possession, for not unoften it happens that before the two months period provided under sub-s. (4) of S. 145 possession of the parties may have been adjudicated upon by a competent Court but still one of the parties may refuse to abide by the decision and take the law into its own hands and interfere with the possession of the other party. When such is the situation it may be a case of a dispute likely to lead to the apprehension of breach of peace. It is the duty of the Magistrate to prevent such breach of peace by taking action under S. 145 of the Code.

4. In the case of Jafar:Hussain v. State, 1968 All L.J 1018, it was observed that the jurisdiction of the Magistrate under S. 145 of the Code remains unaffected by the pendency of a civil litigation between the parties in respect of a title. In the case of Mst. Hosanki v. State, 1955 All W R (H C) 654=(AIR 1956 All 81) a Division Bench of this Court observed :

"In order to attract the application of S. 145, it is not necessary that the dispute should be a bona fide one. It is erroneous to think that when a Magistrate assumes jurisdiction, he does so with the intention of unsettling a settled fact at the instance of the vanquished party. He does not decide the matter contrary to the Civil Court's decision at all. If the Civil Court has decided the question of title only, his decision that the other party has possession cannot possibly be said to be in conflict with the Civil Court's decision. Even if the Civil Court's decision involves a finding on possession in favour of the title-holder, the possession might have been disturbed after the decision and not only would it be open to the Magistrate, but also it would be his duty, to declare that the other party is in possession. If the Civil Court has delivered possession to a party and the possession has not been disturbed by the other party, there is no reason to think that the Magistrate by assuming

jurisdiction would decide the other party to be in possession; if proper evidence is led, he would find the party that succeeded in the Civil Court still in possession and would maintain it. If, however, he has been dispossessed after the delivery of possession by the Civil Court, there is no reason why the Magistrate should ignore that fact and hold the party successful in the Civil Court to be still in possession."

5. For the above reasons I am of the opinion that this reference cannot be accepted and the finding of the Magistrate on the question of possession must stand undisturbed.

6. I reject the reference accordingly and uphold the order of the Magistrate dated 30.4.1965. The record of this case shall be sent down to the Court of the Sub-divisional Magistrate, Tenda, Faizabad, immediately.

Reference rejected.

1970 CRI. L. J. 1029 (Vol. 76, C. N. 258)

(ANDHRA PRADESH HIGH COURT)

MOHAMMAD MIRZA AND CHINNAPPA
REDDY JJ.

In re, Gangavaram Sankaraiah, Accused, Appellant.

Criminal Appeal Nos. 455 and 676 of 1967, D/- 22.11.1968, from order of S. J., Nellore, in Sessions case No. 2 of 1967.

Penal Code (1860), Ss. 97, 99—Right of private defence — Nature of—When can person exercise such right stated.

The right of private defence given under S. 97, I. P. C., is expressly made subject to the provisions of S. 99. The provision in S. 99 which states that there shall be no right of private defence in cases in which there is time to have recourse to the protection of the public authorities really means that there is no right of private defence unless the circumstances are such and the situation is so urgent that there is no time to have recourse to the protection of the public authorities. The urgency of the situation must naturally depend upon several factors. It must depend on the nature of the property which is invaded; it must depend on the use to which the property is being put at the time of invasion; it must depend on the manner of the invasion; it must also depend on the injury to be averted. If the privacy of the home of an individual is invaded, he may pro-

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bably be justified in straightway using reasonable force to remove the invader, of course, after first warning him to remove himself. If a body of persons invade a field in somebody else's possession for the purpose of cutting away or destroying the crop on the field, the person in possession may be justified in using reasonable force to remove the invaders. On the other hand if some trespassers occupy a vacant field and no immediate harm is going to be caused to the land, the owner of the land will not be justified in straightway taking the law into his hands without seeking recourse to the protection of the public authorities. The test is what would the ordinary, reasonable and prudent man who is responsible and accountable for his actions do in the circumstances. Would he think that the threat to his property is so immediate as to warrant his not seeking the help of the authorities but to help himself? "The person exercising a right of private defence must therefore consider whether the threat to his person or his property is real and immediate. If he reaches the reasonable conclusion that the threat is immediate and real, he is entitled to exercise his right." Case law discussed. (Para 13)

Cases Referred : Chronological Paras

(1968) AIR 1968 S C 702 (V 55)= 1968 Cri L J 806, Munshi Ram v. Delhi Administration	15
(1963) A I R 1963 S C 612 (V 50)= 1963 (1) Cri L J 495, Jai Dev v. State of Punjab	13
(1962) Criminal Appeal No. 341 of 1962 (Andh Pra)	14
(1950) ILR (1950) All 167, Prem v. Rex	14
(1948) A I R 1948 Pat 294 (V 35)= 49 Cri L J 403, Narayan Raut v. Emperor	14
(1901) 1901 A C 495 =70 L J P C 74, Queen v. Leatham	16

P. Ramachandra Reddy, for Appellant (In Cri Appeal No 455 of 1967) and for Respondents Nos. 1 to 9 (In Cri Appeal No 676 of 1967), P. Krishna Reddy, for Respondent No. 10 (In Cri Appeal No. 676 of 1967), K. Jayachandra Reddy Addl. Public Prosecutor for Appellant (In Cri. Appeal No 676 of 1967) and for Respondent (In Cri Appeal No. 455 of 1967).

CHINNAPPA REDDY J.: — The two appeals arise out of the same case and may be disposed of by a common judgment. Ten persons were tried by the learned Sessions Judge of Nellore for alleged

offences under Ss. 147, 148, 302 read with 34, 302 read with 149 etc., Penal Code, A-1 to A-8 and A-10 were acquitted of all charges while the ninth accused was convicted of an offence under S. 304, Penal Code but acquitted of other charges. The 9th accused who was sentenced to 7 years rigorous imprisonment for the offence under S. 304 is the appellant in Criminal Appeal No. 455 of 1967 while all ten accused are respondents in Criminal Appeal No. 676 of 1967, which is an appeal filed by the State against the several acquittals recorded by the learned Sessions Judge on various charges.

2. The facts of the case are briefly as follows:

P. W. 6, Sakamuri Chinnamma is the widow of Venkatasubbaiah, brother of the 1st accused. Soon after her husband's death about ten years prior to the occurrence Chinnamma went to live with her parents in Cuddapah District leasing out her properties in her husband's village to the 1st accused. As she was experiencing considerable difficulty in realising from the 1st accused the maktha due to her she returned to her husband's village about one and a half years prior to the occurrence. She lived for a short time in the house of the 1st accused, but later lived separately by herself. There were disputes between P. W. 6 and A-1 regarding possession of the lands belonging to P. W. 6. In particular there was a dispute in respect of 1½ acres of garden land. P. W. 6 complained to A-6 and A-7, elders of the village, that A-1 was giving her trouble with regard to possession of 1½ acres of garden land. She was asked by them to pay a sum of Rs. 30 to A-1 as compensation for the cultivation operations done by him and take possession of the land. Thereafter P. W. 6 leased the garden land to the deceased, Chandra Chinna Venkatasubbiah, who sowed horsegram in the land. Nonetheless A-1 and A-2 ploughed away the land ignoring the lease in favour of deceased. The deceased, thereupon, gave up the lease presumably because he did not want any trouble from A-1 and A-2. P. W. 6 herself cultivated the land and about a week prior to the occurrence she and the wife of A-1 exchanged words when she found A-1's wife in the garden land removing grass. A-1's wife went home and returned with A 1 and A-2 and they beat P. W. 6. P. W. 6 preferred a complaint to the First Class Magistrate at Atmakur against A-1 and A-2 and the wife of A-1, and on 30.11.66 the learned

Magistrate recorded her sworn statement in connection with her complaint.

3. P. W. 6 is admittedly entitled to a half share in a pasture land known as Sakamurivari Beedu in which the 1st accused owns the other half share. According to P. W. 6 and other prosecution witnesses the Beedu was partitioned even during the lifetime of the husband of P. W. 6 and the southern half share of the extent of $4\frac{1}{2}$ acres fell to the share of P. W. 6's husband. It is the case of the prosecution that there is a row of babul and other trees demarcating the shares of P. W. 6 and A-1, while the case of the accused is that the beedu was never partitioned by metes and bounds. While it is the case of the prosecution that on 19.11.66 P. W. 6 leased the pasturage rights in her share of the Beedu to the deceased Chandra Chinna Venkatasubbiah for a sum of Rs. 40, it is the case of the 1st accused that he has been the lessee of P. W. 6's undivided half share in the pasture land for several years paying an annual rent of Rs. 20. On the morning of 12-1966 at about 10 A.M. the deceased and his younger brother Chandriah, P. W. 2, took their five bulls to the Sakamurivari Beedu for grazing. At about 12 noon the ten accused came to the Beedu, A-2 being armed with an axe, A-1 and A-6 to A-10 with spears and A-3 to A-5 with sticks. It may be mentioned here that A-2 is the undivided son of A-1, while the rest of the accused are also closely related to him. As soon as they arrived in the field they began to drive away the bulls from the field and the deceased protested claiming that he had purchased the pasture and that he was therefore entitled to graze his bulls in the field. Thereupon it is alleged that A-6 exhorted the others to stab him. A-9 speared the deceased in the chest, while A-8 and A-1 respectively speared him on the right thigh and hand, A-6 and A-7 also beat the deceased with sticks. P. W. 2 who was at a short distance rushed towards the accused waving a stick which he had with him and hurling stones against them. He was also attacked, various overt acts being attributed to A-1, A-4, A-7 and A-10. P. W. 1, another brother of the deceased who had seen the accused going towards the field armed with deadly weapons and who followed them apprehending injury to his brother also witnessed the attack and rushed forward to save his brothers waving a stick which he had in his hands when he was also attacked by accused 2, 3, 4 and 5. P. Ws. 1 and 2 claim

that as a result of their attacking the accused with sticks to rescue their brother, accused 1 to 5 received some injuries, Kaluva Panchalaiah P. W. 3, a Madiga who was grazing his sheep near the Beedu, Mallineni Kondaiah, P. W. 4, a brother-in-law of the deceased who happened to pass along the Beedu and Kante Subbaramaiah, P. W. 5 who also happened to be passing along the Beedu in search of a lost buffalo also claim to have witnessed the occurrence. It is stated that after P. Ws. 2 and 1 fell down the accused ran away from the scene, A-9 throwing his spear at the scene itself. After the accused left, P. W. 1 went near his brother Venkatasubbiah and found him dead. Chandriah, P. W. 2 was conscious then, but soon thereafter he also lost consciousness. The village Munsif of Gowravaram, P. W. 10, heard from his Thalayari that accused 1 to 5 on one hand and the deceased, P. Ws. 1, 2 and 5 on the other had beaten each other at Sakamurivari Beedu and that one person had died and others had received injuries. He went to the Beedu and found Chinna Venkatasubbaiah dead and P. W. 2 lying unconscious. He asked P. W. 1 who was also injured and who was weeping near his brothers to give a report, but P. W. 1 refused to do so saying that they would not give a report, then, but would give it later after consideration. In an adjoining field the Village Munsif found accused 1 to 5 lying injured and of them A-2 was unconscious. He asked A-1 to give a report, but he also refused to give a report saying that he would do so later and not then. The Village Munsif prepared his report Ex. P8 and despatched it to the police station at Dharmarao Cherruvu. palli where it was received next morning at 6 A. M. Meanwhile P. W. 1 arranged to take his brother Chandriah who was unconscious to the hospital at Atmakur eighteen miles from Gowravaram. They reached the hospital at about 10 P. M. The Medical Officer, P. W. 13 treated both of them and sent intimation of accidents to the Sub-Inspector of Police of Atmakur Police Station. On receiving the intimation of accidents P. W. 16 the Sub-Inspector of Atmakur proceeded to the hospital and recorded Exs. P3 and P4 from P. Ws. 1 and 2 respectively. He forwarded Exs. P3 and P4 to the Sub-Inspector of Dharmarao Cheruvapalli as Gowravaram is within the jurisdiction of that police station. The Sub-Inspector of Dharmarao Cheruvupalli received Exs. P3 and P4 while he was on his way to Gowravaram

having in the meanwhile received Ex. P8 from the Village Munsif. P. W. 19 proceeded to the village, held the inquest at which he examined P. Ws. 3, 4, 5, 6, 9 and 10 and sent the corpse to the Medical Officer at Atmakur for postmortem. He found accused 1 to 5 in their houses with injuries and arranged to send them to the hospital for treatment of their injuries. After completing the investigation a chargesheet was filed against the ten accused. Accused 6 to 10 surrendered before Court on 9-1-1967.

4. It may be mentioned at this juncture that apart from the disputes relating to possession of the lands of P. W. 6, the prosecution has also led evidence to show that there were disputes between the Kammas of the village led by A 6 and A-7 and the Harijans of the village regarding certain foreshore lands and that in that dispute the Balijs of the village led by P. W. 9 and few Kammas like the deceased and his brothers were supporting the Harijans. It is said that on this account also the accused bore a grudge against the deceased and his brothers.

5. A-6 to A-10 denied the offences altogether and A-6 and A-7 who put forward pleas of alibi examined DWs. 1 and 2 in support of their pleas. A-1 to A 5 pleaded, when questioned under S. 342, Criminal P. C. that on the day of incident they were grazing their bulls in the Sakamurivari Beedu and that the deceased and P. Ws. 1 and 2 came there driving their bulls and attacked them. At that time P. W. 1 was armed with a spear and the rest with sticks. When they were thus attacked by deceased and P. Ws. 1 and 2 they also beat but they did not know who were injured.

6. The learned Sessions Judge found that the Sakamurivari Beedu was never partitioned by metes and bounds and that the alleged lease of her half share of the beedu by P. W. 6 in favour of the deceased was not true. The learned Sessions Judge also found that the 1st accused was in possession of the beedu right up to the date of incident. These findings have not been assailed before us by the learned Public Prosecutor. Dealing with the actual occurrence the learned Sessions Judge unhesitatingly rejected the evidence of P. W. 4. He however accepted as truthful the evidence of P Ws. 1 and 2 the two injured brothers of the deceased and the evidence of P. Ws. 3 and 5 who according to the learned Sessions Judge are independent

witnesses. We do not share the learned Judge's view that P. Ws. 4 and 5 are independent witnesses but we are, nonetheless, satisfied that they have given a substantially true account of the broad features of the incident. The learned Sessions Judge's finding regarding the occurrence and the reasons for his finding are stated by him in para 25 of his judgment which is as follows:—

"The deceased received seven incised injuries which could have been caused only by a sharp instrument like a spear. P. W. 1 received two contusions and two lacerated wounds. P. W. 2 received two incised wounds and only one contusion. So far as the accused are concerned, the 1st accused received one lacerated wound and four contusions. The 2nd accused received one lacerated wound and three contusions. The 3rd accused received two lacerated wounds and three contusions. The 4th accused received only one contusion. The 5th accused received one lacerated wound and an abrasion. The relative postmortem certificate and the wound certificates are Exhibits P-16, P. 14, P. 15 and P-17 to P. 21. From the nature of the injuries received by the deceased and P. W.-2 it is clear that they were inflicted by the accused who must have gone there with the sole purpose of attacking them. The carrying of sharp instruments would disclose a sense of preparedness on their part. So far as the injuries received by accused 1 to 5 are concerned, they could have been caused by sticks or by hurling of stones. Both P. Ws. 1 and 2 have stated that when the accused have attacked the deceased, they tried to interfere and began to hurl stones against the accused to scare them away and they have also hurled sticks. While P. Ws. 1, 2, 3 and 5 have explained the injuries which have been inflicted on accused 1 to 5, the accused have not explained the incised wound which they have inflicted on the deceased and P. W. 2. If really accused 1 to 5 were grazing the cattle and they were attacked later by P. Ws. 1, 2 and the deceased, the incised wounds would not have been there for the deceased and P. W. 2. The very fact that sharp instruments are used by the accused would disclose that at the time they went to Sakamurivari Beedu, they fully knew that P. Ws. 1, 2 and the deceased were already grazing the cattle in the Sakamurivari Beedu. Further P. Ws. 1, 2 and the deceased would not have gone later especially if they know about the presence of A-1 to A-5 in the

pasture. The number of the accused party is larger and the probability is they went there later. I, therefore, have no hesitation in holding that on 1-12-1966 P. W. 2 and the deceased were grazing the cattle in the pasture land and they were attacked by the accused resulting in the death of the deceased and when P. W. 2 and later P. W. 1 intervened, they were over-powered by the accused and whatever injuries accused 1 to 5 have received, have been received by them at the hands of P. Ws. 1 and 2."

Sri Ramachandra Reddy, learned Counsel for the accused does not challenge the correctness of this finding but he would amend the finding by stating that P. W. 1 was also with the deceased and P. W. 2 from the beginning. On a perusal of the evidence we are satisfied that P. W. 1 was not there from the beginning but came to the scene apprehending injury to his brothers when he saw the accused party going out fully armed.

7. The learned Sessions Judge has found that A-9 was responsible for the injury on the chest which according to the doctor who conducted the autopsy is the fatal injury. All the witnesses are unanimous that A-9 was responsible for the injury and it has not been suggested to the witnesses that they had any special reason for attributing the fatal injury to A-9. The attack on the deceased started with the spear-thrust by A-9 and it is not possible for the witnesses to have made any mistake about the identity of A-9 and the injury caused by him. We therefore accept the finding of the learned Sessions Judge that A-9 was responsible for the injury on the chest of the deceased. We are not however prepared to accept the evidence of the witnesses when they give details of the rest of the attack on the deceased and on P. Ws. 1 and 2, and meticulously ascribe every injury to a particular accused. It is possible that the witnesses did notice some of the injuries being inflicted by the particular accused mentioned by them but it is difficult to accept their evidence when they attempt to account for every injury. When the accused party entered the field and proceeded to attack the deceased, A-9 delivering the first blow, P. Ws. 1 and 2 must have rushed to the rescue of their brother and there must have been quite a melee. It must be remembered that A-1 to A-5 between them received as many as 16 injuries. We do not think that it is safe to accept the evidence of the witnesses

regarding the individual acts attributed to the various accused. In that view we do not also think that it is safe to accept without anything more the evidence of the witnesses regarding the presence and participation of the several accused. We have already found that A-9 was responsible for the injury on the chest of deceased. A-1 to A-5 admit their presence in the beedu at the time of occurrence and in fact they were found lying injured in the neighbouring field by P. W. 10, the Village Munsif, soon after the occurrence. We feel that the evidence of the prosecution witnesses regarding the presence and participation of A-1 to A-5 and A-9 may safely be accepted but not so with regard to A-6, A-7, A-8 and A-10. We have also no doubt that the exhortation attributed to A-6 is not true and that he is given that part because he is a prominent member of the group to which the accused belong.

8. Our conclusions on the incidents of 1-12-1966 are as follows:—

The deceased and P. W. 2 took their bulls to the pasture land, Sakamurivari Beedu, for grazing for the first time that day. Till that day the beedu was in the possession of A-1. Learning that the deceased and P. W. 2 were grazing their bulls in the beedu A-1 to A-5, A-9 and possibly some others armed themselves with spears, sticks and other weapons and proceeded to the field with the object of attacking and injuring the deceased and P. W. 2 and removing them and their bulls from the beedu by the use of force. As soon as they reached the field they drove away the bulls and when the deceased protested saying that he had a right to graze the bulls in the field they attacked him, A-9 delivering the first thrust with his spear. When P. Ws. 1 and 2 rushed to protect the deceased brandishing sticks and using them they attacked them also and there was a melee.

9. On these conclusions, the question is whether A-1 to A-5 and A-9 have committed any offences. On substantially the same conclusions the learned Sessions Judge held that all the accused except A-9 were protected by the right of private defence of property but A-9 alone had exceeded the right of private defence and was guilty under S. 304. In our view in considering the question whether any of these accused have committed any offences the following facts have also to be borne in mind:—

10. The Sakamurivari Beedu is a mere pasture land on which no crops are

grown. The value of the pasture may be judged from the fact that the pasturage rights for a whole year are worth according to the accused Rs. 20 and according to P. W. 6 Rs. 40. Even if the deceased and P. W. 2 had been allowed to graze their bulls the whole of 1-2 1966, injury caused to the property would have been trivial. The trespass itself would have come to an end in the evening in the usual course. The accused could well have gone to the Village Munsiff, P. W. 10, who is related to both parties. If for any reason that was not thought desirable the accused could have gone to the Police Station at Dharmarao Cheruvapalli or to the Inspector of Police at Atmakur and sought the protection of these public authorities. It is in evidence that both places are conveniently approachable by bus. Instead of doing that, the accused preferred to march into the Beedu in numbers far superior to the pitiful two or even three members of the prosecution party and in arms far outmatching the goad-sticks (sticks used to drive bulls) which the members of the prosecution party had with them.

11. Sri Ramchandra Reddy, learned Counsel for the accused argues that the accused are fully protected by S. 96 of the Penal Code as they were acting in exercise of the right of private defence of property. Relying on a sentence in a judgment of the Supreme Court that 'there is nothing more degrading to the human spirit than to run away in the face of peril' he poses to us the question whether the accused were expected to be mean spirited and flee like cowards when the prosecution party started grazing their bulls in the fields in the possession of the accused. I, for my part, am able to see neither courage nor spirit in an armed group of persons going out to attack a smaller and ill armed group for the alleged purpose of defending property, the invasion of their property extending to no more than taking a few head of cattle for pasture. In our opinion, however, considerations of courage and cowardice or spirit and the lack of it are entirely misplaced in considering the question whether a person can be said to have acted in exercise of the right of private defence of property. Indeed, who can say that a person who, when beaten on one cheek turns the other is less courageous than the person who unsheaths his sword immediately? Who can say that a person who with great self-restraint refuses to resort to violence in the most critical of

situations is mean-spirited? It certainly requires moral courage and self-discipline to resist the temptation of circumstances and emotion, and refuse to resort to violence. Did not Jesus Christ say 2000 years ago "Blessed are the meek, for they shall inherit the earth." Did not Gandhiji repeat this ever and ever? Let us not therefore confuse ready resort to violence with any uplifting of the human spirit even as it cannot necessarily be identified with an animal spirit. There are other ways of looking at the problem than merely in terms of physical courage and 'manly spirit.' Self-restraint, discipline and moral courage are as important, if not more important. We have digressed, but only to answer the rhetorical question posed to us by the learned counsel.

12. The most ancient functions of the State and its laws have been the preservation of the public peace and public order and the substitution of private justice by public justice. In other words, the responsibility for the preservation of the public peace and order, including the protection of its citizens and their properties and the prevention of crime is that of the State. Conversely no one is entitled to take the law into his own hands. This is of the very essence of the scheme of things in a well ordered civilised society. But public justice may not always be prompt. Its intervention may come too late and meanwhile great and irreparable injury may be done. A crime may be committed which could well have been prevented by prompt private intervention. It is to meet such situations that an exception has been engrafted in S. 96 and the subsequent provisions of the Penal Code to the general rule that no one shall take the law into his own hands. The right of private defence given under Ss. 96 and 97 is, however, circumscribed by the several conditions mentioned in the subsequent sections. One of the conditions mentioned in S. 99 is

"There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities."

This is no less than an affirmation of the general rule that no one shall take the law into his own hands. It is with this condition that we are primarily concerned in this case. Another condition mentioned in S. 99 is :

"The right of private defence in no case extends to the inflicting of more harm

than it is necessary to inflict for the purpose of defence."

Sections 97 and 105 in so far as they are relevant are as follows :

"97. Every person has a right, subject to the restrictions contained in S. 99, to defend—

First.

Secondly—The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."

"105. Commencement and continuance of the right of private defence of property—

The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief."

13. Sri Ramchandra Reddy, learned Counsel urges that the prosecution party having committed criminal trespass, were continuing to do so and therefore the accused had every right to use reasonable force to remove them from the land. He urges that where criminal trespass has already been committed and is continuing, the question of seeking the protection of the public authorities does not arise. The acceptance of such an argument would be subversive of the whole scheme of Ss. 97, 99 and 105 of the Penal Code. The rule which insists that the protection of the public authorities, should first be sought if possible, is a rule conceived in the public interest and with the object of eliminating private justice and unnecessary violence. The rule is applicable whether the criminal trespass has already been committed and is continuing or is only anticipated. The right given under S. 97 is expressly made subject to the provisions of S. 99. The provision in S. 99 which states that there shall be no right of private defence in cases in which there is time to have recourse to the protection of the public authorities really means that there is no right of private defence unless the circumstances are such and the situation is so urgent that there is no time to have recourse to

the protection of the public authorities. The urgency of the situation must naturally depend upon several factors. It must depend on the nature of the property which is invaded ; it must depend on the use to which the property is being put at the time of invasion ; it must depend on the manner of the invasion ; it must also depend on the injury to be averted. If the privacy of the home of an individual is invaded, he may probably be justified in straightway using reasonable force to remove the invader, of course, after first warning him to remove himself. If a body of persons invade a field in somebody else's possession for the purpose of cutting away or destroying the crop on the field, the person in possession may be justified in using reasonable force to remove the invaders. On the other hand if some trespassers occupy a vacant field and no immediate harm is going to be caused to the land, the owner of the land will not be justified in straightway taking the law into his hands without seeking recourse to the protection of the public authorities. The test is what would the ordinary, reasonable and prudent man who is responsible and accountable for his actions do in the circumstances. Would he think that the threat to his property is so immediate as to warrant his not seeking the help of the authorities but to help himself? Their Lordships of the Supreme Court of India have stressed this aspect of the matter in *Jai Dev v. State of Punjab*, AIR 1963 S C 612 at p. 617 where Gajendragadkar J. (as he then was) has observed as follows :

"To begin with, the person exercising a right of private defence must therefore consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right."

14. In *Prem v. Rex*, ILR (1950) All 167 the facts were that one party was found sowing a field in the possession of another party who had already sown that field. The question arose whether the other party could assault the first party in the exercise of the right of private defence of property. *Raghubar Dayal and Agarwala JJ.* observed :

"The mere fact that Ram Baran and party entered the field, which was in the possession of Sarju, and sowed it would not suffice to give a right of private defence of property to Sarju. Firstly, it is debatable whether such conduct of Ram

Baran and his party would amount to criminal trespass on an inference that their intention must have been to annoy Sarju. Even if such an intention be imputed to them and their act could amount to the commission of criminal trespass, the right of private defence of property against criminal trespass which would arise in favour of Sarju will be taken away on account of the provisions of S. 99 of the Indian Penal Code. It says that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Ram Baran and party were not doing any actual damage to the crop raised by Sarju on the field. In fact, what they were doing could have been beneficial to the crop. Sarju stood nothing to lose if he would have taken legal steps to restrain Ram Baran and others from interfering with his possession of that field. The criminal trespass of the kind would have, in the nature of things, come to an end at the close of the day. When no actual damage was being done to any property of Sarju he really had nothing to protect. The conduct of Ram Baran could have affected Sarju adversely by affording an instance of Ram Baran's assertion of his right and of exercising that right in any future litigation between Sarju and Ram Baran. This may not be to the benefit of Sarju, but is not such harm or damage which had to be protected by Sarju at the time. Further it appears from the evidence that the accused appellants did not ask Ram Baran to go away from the field, the first usual step to be taken against a trespasser. They questioned Ram Baran about the reason for his going to the field and on his intimating his reason they, at the suggestion of Hattu, fell upon him with lathis. Their conduct was not, therefore, to protect their possession against the criminal trespass of Ram Baran, but appears to be in order to teach Ram Baran a lesson on account of his audacity to act against the thekadar's interests. We are, therefore, of opinion that there was no right of private defence of property against criminal trespass in the accused appellants and that they cannot be said to have been acting in the exercise of that right when they beat Ram Baran."

In *Narayan Raut v. Emperor*, AIR 1948 Pat 294 the facts were that Narayan was in possession of certain land which was not under any crop. Bujhawan and his party went to the land for the purpose of ploughing the land and thus dispossessing Narayan. Narayan attacked and killed

Bujhawan. Agarwala C. J., and Ramaswami J. observed:—

"The land was not under crop at the time of the occurrence. All that the prosecution party were doing was to plough the land. They were not doing any immediate harm. There was, therefore, ample time for Narayan to have recourse to the public authorities for the protection of his rights. In this case, as so often happens in cases of this nature, the fact that the right of private defence does not arise when there is time to have recourse to the public authorities, has been overlooked. Even in this Court the learned Advocate referred us to S. 97, Penal Code, and argued that as the act of the prosecution party amounted to criminal trespass, the defence were protected by that section. The section, however, expressly states that it is subject to S. 99 which explicitly provides that there is no right to private defence when there is time to have recourse to the public authorities."

These two cases are clear authorities for the position that the mere fact that the opposite party has trespassed into the field of a person does not straightway clothe that person with the right to act in alleged exercise of right of private defence, when there is time to have recourse to the protection of the public authorities, and no immediate injury is going to be suffered in consequence in the meanwhile. We are in respectful agreement with the observations of the learned Judges above extracted by us. These observations have also been accepted by another Division Bench of this High Court as laying down the correct principles. (Vide *Manohar Pershad and Narasimham JJ.*, in Criminal Appeal No. 341 of 1962 (Andh. Pra.)).

15. Sri Ramachandra Reddy relies upon a judgment of the Supreme Court in *Munshi Ram v. Delhi Administration*, AIR 1968 S C 702. The facts of the case are as follows:

16. One Jamuna, a former tenant of certain Muslim landlords who migrated to Pakistan, was in possession of a certain field for over 30 years prior to the date of occurrence. P. W. 17 in the case purchased the property at a public auction held by the Government under the Displaced Persons Act, 1954. Delivery of the property was alleged to have been given to P. W. 17 on 22-6-1962 by the managing officer. Jamuna was not aware either of the purchase by P. W. 17 or of the delivery alleged to have been given on 22-6-

1962 and he continued to be in possession right upto the time of incident. It was also found as a matter of law, that the managing officer was incompetent to give delivery of possession of the field. It was further found that crop grown by Jamuna was there in a portion of the field. While so, on 1-7-1962, P. W. 17 and several persons went to the field with a tractor to level the land. All that time P. W. 17's father was even armed with a pistol. At that stage the relations of Jamuna went to the field and asked the complainant's party to clear out of the field. When they refused to do so, they pushed them and thereafter used minimum force to throw them out of the field. On these facts their Lordships of the Supreme Court found as a fact that Jamuna's relations had no time to have recourse to the protection of public authorities. This case cannot be of any assistance to the accused in the present case because there, the crop raised by Jamuna was about to be destroyed and the land itself was about to be levelled up by a tractor. Their Lordships, it is true, observed :

"Law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities. The right of private defence serves a social purpose and that right should be liberally construed. Such a right not only will be a restraining influence on bad characters but it will encourage the right spirit in a free citizen. There is nothing more degrading to the human spirit than to run away in the face of peril".

From these observations it is difficult to conclude that their Lordships intended to lay down the wide proposition for which Mr. Ramachandra Reddy is contending. These observations must naturally be read in the context of the facts of that case. It will be useful to recall here the following observations of Lord Halsbury in *Queen v. Leathen*, (5) 1901 A C 495 at p. 506.

"... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what

it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it".

(17) In the present case the criminal trespass was by two individuals with their five bulls. The trespass was for the purpose of grazing the bulls. As already observed by us the trespass would have, in the ordinary course, come to an end by the evening. The injury to the property which might be caused by allowing the bulls to graze in the meanwhile would have been negligible. In those circumstances we cannot but hold that there was ample time to seek protection of the public authorities. We therefore hold that the accused are not entitled to justify their acts by claiming to have acted in exercise of the right of private defence of property. The banding together of not less than six persons armed with deadly weapons was wholly unnecessary if the object of the accused was merely to defend their property against the trespass by the deceased and P. W. 2. It was an exercise in the might of superior force rather than an exercise of the right of private defence. We have no doubt that accused 1 to 5, 9 and some others formed themselves into an unlawful assembly with the common object of teaching a lesson to the deceased and P. W. 2 and causing injuries to them. However, having regard to the fact that apart from the injury caused by A-9 all the injuries caused to deceased and P Ws. 1 and 2 are not of serious nature, we are of the view that the common object of the unlawful assembly was not to cause death or even grievous hurt, but only to cause hurt. A-1 to A-5 and A-9 are, therefore, guilty of the offence of rioting.

(18) In view of our finding that none of the accused is entitled to claim the protection of the right of private defence, the finding of the learned Sessions Judge that the act of A-9 came within the second exception to S. 300 must also be set aside. The question then is what is the offence committed by A-9? It is true that the injury caused by him is sufficient in the ordinary course of nature to cause death. While we are satisfied that A-9 intended to cause an injury likely to cause death, we are not satisfied that he intended to cause the particular injury. On exploration of the external injury caused by A-9, it was found to extend medially and upwards, entering the pericardium. It is very likely that the upward course of the injury and the entry into the pericardium was the result of some sudden movement on the part of the deceased,

making the weapon move upwards instead of horizontally or downwards. It is not without hesitation that we are arriving at this conclusion, but we cannot alter the conviction of A-9 to one under S. 302 unless we are able to find with certainty that he intended to cause the particular injury. In the circumstances we confirm the conviction of A-9 under S. 304.

19. In the result accused 1, 2 and 9 are convicted under S. 148, Penal Code and each of them is sentenced to pay a fine of Rs. 600 each, in default to undergo rigorous imprisonment for a period of nine months. Accused 3, 4 and 5 are convicted under S. 147, Penal Code and each of them is sentenced to pay a fine of Rs. 500 in default to undergo rigorous imprisonment for a period of six months. Accused 1, 2, 3, 4 and 5 will also execute bonds in a sum of Rs. 2,000 each with one surety each for a like sum to keep the peace for a period of one year under S. 106, Criminal P. C. They will appear before the learned First Class Magistrate of Atmakur within four weeks from today and execute the bonds. The conviction of A-9 under S. 304 is confirmed as also the sentence awarded to him for that offence. Accused 1 to 5 are also convicted under S. 324 read with S. 149 in respect of the injuries caused to the deceased and to P. Ws. 1 and 2. A-9 is further convicted under S. 324 read with S. 149 in respect of the injuries caused to P. Ws. 1 and 2. No separate sentences are awarded to any of the accused for the offences under S. 324 read with S. 149, Penal Code. Cri. Appeal No. 455 of 1967 is accordingly dismissed and Criminal Appeal No. 676 of 1967 is allowed in the manner indicated.

Order accordingly.

1970 CRI. L. J. 1038 (Vol. 76, C. N. 259)

(BOMBAY HIGH COURT)

VAIDYA J.

State, Appellant v. Bherulal Dagadulal Jain and others, Accused, Respondents.

Criminal Appeals Nos. 238 and 240 of 1968, D/- 2-7 1968.

Criminal P. C. (1898), Ss 345 (6) and 251-A — Penal Code (1860), Ss. 323, 504, 506, 541 and 148 — Accused charged for offences on basis of police report — Offences under Ss. 323, 504, 506 and 541 compounded — Magistrate has to dis-

charge accused for offence under S. 148 also under S. 251-A. (1923) 24 Cri L J 114 (Mad), Diss. .

Where accused are charged on the basis of a police report under Ss 323, 504, 506 and 541 and S. 148 of the Penal Code and offences under Ss. 323, 504, 506 and 541 are compounded by the complainant and the accused, the proper order to be passed by the Magistrate is to discharge the accused under S. 251A(2) for the offence under S. 148. The Magistrate in such a case cannot proceed with the trial after framing a charge under S. 148 and pass an order of acquittal. (1923) 24 Cri L J 114 (Mad), Diss. Case law discussed.

(Para 12)

The very fact that under S. 345 of the Criminal Procedure Code certain offences are allowed to be compounded show the intention of the legislature that although these are offences punishable under the Indian Penal Code, the interest of society and public order do not require that the State should prosecute the persons concerned after the composition. That is why the effect of composition is said to be that of an acquittal. It cannot be argued that a person is acquitted of the offence and still he has committed an offence. It cannot also be argued that although each of the accused has not committed the offence all of them together have committed the offence.

(Para 11)

Cases Referred: Chronological Paras

(1968) Cri Appeal No. 288 of 1968
D/- 27-6-1968 (Bom) 7

(1964) 1964 (2) Cri L J 111 (Pat)
Ramphal Gope v. State of Bihar
2, 3, 4, 5, 10

(1960) AIR 1960 Bom 269 (V 47) =
1960 Cri L J 814, State v Kama-
lakar Prabhakar Juvekar 4, 8

(1923) 24 Cri L J 114 = ILR 46 Mad
257, In re, Matti Venkanna 4, 9

(1913) 14 Cri L J 77 = ILR 37 Bom
369, Emperor v. Ranchhod
Bawala 4, 7

(1902) 4 Bom, L R 718, Emperor v.
Asmal Hasan 4, 6

R. S. Bhonsale, Hon'ble Asst. to Govt. Pleader, for State (in both appeals). A. G. Sabnis, for Accused No. 1 to 7 (in Cri. Appeal No. 238 of 1968); A. V. Savant, for Accused Nos. 1 to 7 (in Cri. Appeal No. 240 of 1968).

JUDGMENT. — The State has filed the above appeals against the orders of acquittal passed by the Judicial Magistrate, First Class, Manmad, on October 28, 1967,

in two criminal cases before him, both of which related to an incident which took place at about 7-30 p. m. on October 7, 1966 in Manmad. The first information in one case was given by one Zumberlal Rajmal Chajed and the first information in the other case was given by one Parasmal Mesulal Jain relating to the said incident. As these two appeals relate to the same incident and involve a common question of law, they can be disposed of by a single judgment.

2. Criminal Appeal No. 238 of 1968 arises out of Criminal Case No. 778 of 1966 before the said Magistrate. A charge-sheet was filed before him on October 15, 1966 against the 7 respondents in that appeal, viz., (1) Bherulal Dagdulal Jain, (2) Kantilal Dagdulal Bardiya, (3) Madanlal Panalal Bardiya, (4) Dharamchand Dagduram Bardiya, (5) Parasmal Bherulal Bardiya, (6) Balu Kondaji Karde, and (7) Shridhar Waman Paliwal. It was alleged in the said charge-sheet by the Police Sub-Inspector, Manmad City, that on October 7, 1966 at 7-30 p. m., the 7 accused formed an unlawful assembly in an open street of Manmad City inasmuch as, as a result of a meeting of bank, they entertained a common object of beating the complainant Zumberlal Rajmal Chajed and witnesses Amarchand Babulal Chajed, Manakchand Rajmal Chajed and Motilal Rajmal Chajed and in pursuance of that common object, they voluntarily caused injuries to them with blows and kicks and with wooden pieces and bamboo sticks and also abused them and threatened to kill them and thereby committed offences under Ss. 147, 148, 323, 504 and 506 of the Indian Penal Code. The Judicial Magistrate, First Class, Manmad, issued process on perusal of the charge-sheet and made it returnable on October 29, 1966. On October 29, 1966, the accused were present in Court, but an application was made for adjournment and the case was adjourned to November 23, 1966. Thereafter the case was adjourned from time to time for various reasons till March 17, 1967, when the parties filed an application, Ex. 15, signed by the complainant Zumberlal, the 7 accused persons and the witnesses who were alleged to have been hurt in the course of riot. This application was objected to on behalf of the prosecution on the ground that by law, partial compounding was not allowed and if the parties wanted withdrawal, they should move the District Magistrate in respect of the offences mentioned in the chargesheet. The Judicial Magistrate,

however, passed the following order on that very day :

"Application is allowed. Accused are acquitted of the offences under Ss. 323, 504 and 506 of the Penal Code."

It may be noted here that in the application, Ex. 15, the complainant, the accused and the witnesses referred to above had mentioned that the compromise was arrived at as a result of the efforts of many gentlemen and leaders. It also stated that the signatories to Ex. 15 belonged to merchant class and respectable families and as a result of this compromise, the relations among them were as they were before the incident and had become very harmonious and peaceful. They had to meet each other every day in connection with business and with a view to maintain good relations, the purshis was being filed for compounding the offences under Ss. 323, 504 and 506. Thereafter the case was adjourned to March 31, 1967 and further adjourned to April 14, 1967. On April 14, 1967, the accused filed an application, Ex. 17, for adjournment of the case stating that they had applied to the District Magistrate for withdrawing the case and that application was not decided. The case appears to have been adjourned further for awaiting the orders of the District Magistrate till August 4, 1967. It is most regrettable that the District Magistrate does not appear to have passed any order with regard to the withdrawal in spite of the waiting by the parties and the Court for more than four months. On August 4, 1967, the Judicial Magistrate, who had succeeded the previous Judicial Magistrate framed a charge against the 7 accused under S. 148 of the Indian Penal Code, the material portion of which was as under :

"That you on or about the 7th October 1966 at 7-30 p. m. at Manmad were members of an unlawful assembly and did in prosecution of common object of such assembly, viz., to cause hurt to Zumberlal Chajed, committed the offence of rioting and at that time were armed with deadly weapons and thereby committed an offence punishable under S. 148 of the Indian Penal Code . . . ,".

The accused pleaded not guilty to the said charge. After framing the charge, the case was adjourned from time to time till September 20, 1967 when prosecution witness No. 1 Zumberlal, the complainant, was examined as a witness. He proved his first information before the police at

Ex. 26. Immediately after his evidence was recorded, an application was filed by the pleader for the accused submitting as under :

"The police have chargesheeted the accused under Ss. 117, 328, 504, 506, 34, Indian Penal Code. Except under S. 147, Indian Penal Code, the offences under other sections are compoundable and are compounded. The complainant has averred that he has compounded the offence under S. 147, Penal Code also. He does not intend to proceed with the trial. The technicality of non-compoundability of offence under S. 147 is set at rest by a ruling quoted in 1964 (2) Cri L J 111 (Pat). It is therefore requested that the accused may please be acquitted."

This application was resisted on behalf of the prosecution on several grounds. It was contended that the accused being charged under S. 148 of the Penal Code the acquittal of the accused in respect of compoundable offence would not bar a trial of the accused under S. 148 of the Penal Code. It was also contended that it would be against public policy and public interest to permit the compounding of the offence and it was, therefore, prayed that the prosecution should be given an opportunity to lead evidence against the accused. The learned Magistrate, however, overruled the objections on behalf of the prosecution and following the decision of the Patna High Court in Rampal Gope v. State of Bihar, 1964 (2) Cri L J 111 (Pat) came to the conclusion that since the main offences were compounded, there could not be a trial of the offence under S. 148, Penal Code. He also relied on a judgment of the Assistant Judge of Nasik, which was cited before him. He concluded that the offence under S. 148, Penal Code must fail as the main offences have been compounded. He, therefore, acquitted accused Nos. 1 to 7 of the offence under S. 148, Penal Code,

3. In Criminal Appeal No 240 of 1948 also the charge-sheet was filed on October 15, 1956, against the 7 accused, viz., (1) Amarchand Babulal Chajed, (2) Babulal Rajmal Chajed, (3) Zumberlal Rajmal Chajed, (4) Manakchand Rajmal Chajed, (5) Motilal Rajmal Chajed, (6) Bhaskar Shankar Nagare, (7) Sakharam Gopinath Darde. It may be noted that the accused Zumberlal was the complainant in the other case. The accused Amarchand, Babulal, Manakchand, Motilal were cited as witnesses in the other case. It was alleged that these 7 accused on October

7, 1966 at about 7-30 p. m. beat the complainant Parasmal and witnesses Kantilal Dagduram Jain and Bhesulal Dagduram Jain and caused them hurt and accused No. 1 entered, in the house of the complainant and committed trespass and all these offences were committed with a common object of the accused as a result of the meeting of the bank referred to above in the other case. It was also alleged that they threatened to kill the complainant and hence the accused had committed offences under Ss. 147, 148, 451, 323, 504, 506 of the Penal Code. This case also took a parallel course to the other case and an application, Ex. 15 was filed on March 17, 1967 i. e., on the same day on which Ex. 15 was filed in the other case and with the same contents signed by the complainant, the accused and the injured witnesses who were cited in the chargesheet. The application was opposed on the same grounds on behalf of the prosecution and the learned Magistrate on the very day passed an order as follows :—

"The accused are acquitted of the offences under Ss. 323, 504 and 506 of the Penal Code."

Thereafter the case was adjourned almost on the same dates as the other case and on the very day on which the charge was framed in the case referred to above, a charge was framed against the accused in this case, the material portion of which was as follows :—

"That you on or about the 7th October 1966 at Manmad at about 7-30 p. m. were a member of an unlawful assembly and did in prosecution of common object of such assembly, viz. to cause hurt to Parasmal, committed the offence of rioting and at that time were armed with deadly weapons.

At the same place and at the same time committed house trespass by entering into the building of Parasmal, used as human dwelling, in order to commit the offence of causing hurt to said Parasmal and thereby committed an offence punishable under Ss. 148 and 451 of the Penal Code and within my cognizance."

The accused pleaded not guilty to the said charge. Thereafter an application was filed on September 20, 1967, which was similar to the application, Ex. 27, in the other case. By that application the accused requested that they may be acquitted in view of the decision in 1964 (2) Cri L J 111 (Pat). The application was opposed on similar grounds on behalf of

the prosecution as in the other case and an order was passed by the learned Judicial Magistrate acquitting accused Nos. 1 to 7 holding that in view of the law as stated in 1964 (2) Cri L J 111 (Pat) the accused having compounded the main offence, the offence under S. 148, Penal Code could not be alleged against them.

4. It is against the aforesaid orders of acquittal in the two cases that the State has filed the above two appeals. Both of them involve the common question as to whether in the facts and circumstances of the case, the Judicial Magistrate was right in holding that the charge under S. 148 must fail because the main offences alleged in the charge were compounded. Mr. Bhonsale, the Honorary Assistant Government Pleader, contends in support of the appeals that the learned Magistrate had no jurisdiction to entertain the applications for recording the compromise in respect of the offences under S. 148 of the Penal Code because an offence under S. 148 was not compoundable even with the permission of the Court. He has relied on decisions of this Court in *Emperor v. Ranchhod Bawla* (1913) ILR 37 Bom 369, 14 Cri L J 77, *Emperor v. Asmal Hasan*, (1902) 4 Bom L R 718, *State v. Kamalakar Prabhakar Juvekar*, A I R 1960 Bom 269. He has also relied on a decision of the Madras High Court in *In re Matti Venkanna* (1923) ILR 46 Mad 257 = (24 Cri L J 114). He contends that the offence of rioting is a serious offence against public tranquillity and such an offence could not be compounded and the accused could not be allowed to be acquitted in respect of such an offence merely because the injured parties and the accused came to a private settlement or a settlement at the instance of their friends and well-wishers. He argued that the applications for recording the compromise were opposed by the Police Prosecutor on behalf of the prosecution inter alia on the ground that the prosecution wanted to lead further evidence in the matter and hence the Magistrate had no jurisdiction to overrule the contentions in view of the mandatory provisions of S. 251A of the Criminal P. C.

5. As against this, the learned Counsel for the accused rely on the decision of the Patna High Court in 1964 (2) Cri L J 111 (Pat) and contend that once the offence to commit which was the object of the unlawful assembly, is compounded, no charge can be levelled against the accused in respect of the offence because under S. 345 (6) of the Criminal P. C., the com-

position of an offence has the effect of an acquittal of an accused. It is argued that once there was an acquittal for the offences to commit which the unlawful assembly came into existence, it would not be legal to hold that in spite of the composition and its effect as acquittal, the accused could be prosecuted for being members of an unlawful assembly. It is contended that the principle of *autrefois acquit* would operate and for the same offence, the same persons could not be prosecuted after the acquittal. They submit that in the facts and circumstances of the present case, the offence alleged under S. 148 of the Indian Penal Code, was not distinct from the offences which were compounded and hence on the composition of those offences the charge under S. 148 did not survive. It is, therefore, necessary to consider these contentions in the light of the above decisions and the provisions of the Code of Criminal Procedure and the facts and circumstances of the two cases from which the above two appeals have been filed.

6. In (1902) 4 Bom L R 718, the accused were forwarded to the Magistrate on a police report setting out offences under Ss. 325 and 511 of the Indian Penal Code. The evidence taken by the Magistrate clearly disclosed an offence under S. 148. The complainant applied to withdraw the case on the ground that some of the witnesses had turned round. The Magistrate allowed the offence to be compounded and it was held by Crowe and Aston JJ. that the Magistrate had no authority to allow the offence to be compounded and to usurp the jurisdiction not vested in him by law as the offence disclosed was not compoundable under S. 345 of the Criminal P. C. It was also pointed out in that case that in fact the offences were not compounded. No question arose in that case as to whether a charge under S. 148 could be framed after the composition of offences alleged to have been committed in the course of the rioting. The evidence in the case disclosed an offence under S. 148 which was not compoundable and hence, with respect, the order of the Magistrate permitting the composition was rightly set aside. However, there is nothing in that case which is relevant for the purpose of deciding the question involved in the present appeals, particularly because in that case it was found that in fact there was no composition.

7. In (1913) ILR 37 Bom 369: (14 Cri L J 77), the question which arose for decision was, as stated by Batchelor J., "whether

in a warrant case in respect of a non-compoundable offence it is competent to the Magistrate on a private complainant's offering to withdraw from the prosecution, to enter an order of acquittal". This Court held that it was not so competent. The facts in that particular case were that a complaint was made to the police accusing certain persons of the offence of criminal breach of trust punishable under S. 406 of the Indian Penal Code. The police after enquiry committed the accused persons for trial to the Magistrate's Court. The complainant was examined and the trial was postponed and on the postponed date, the complainant applied to the Magistrate to allow him to withdraw from the case. He urged that the accused persons were his labourers, that they had agreed to restore the property which he had accused them of misappropriating and that as the rainy season was approaching, he was unwilling to proceed. Thereupon the Magistrate made an order to the effect that the complainant was allowed to withdraw the case and the accused were acquitted under S. 258 of the Criminal P. C. This Court took the view that the order passed by the Magistrate was unwarranted by any provisions of the Criminal Procedure Code because the offence was a non-compoundable offence and the only sections which contemplate the termination of a criminal prosecution by private arrangement were Ss. 248 and 345. But since the offence was not an offence triable as a summons case, S. 248 did not apply. Section 345 also did not apply because the offence was not compoundable. This Court also observed that the only means by which an order of acquittal could legally be arrived at under Chapter XXI applicable to a warrant case was under S. 258, that is to say, an order of acquittal could be pronounced only where after the framing of a charge the Magistrate was of opinion that the evidence was insufficient to justify a conviction. In that case, however, no charge was framed and the Magistrate instead of exercising his own mind upon the evidence in the case, allowed the decision to be taken out of his hands by a private arrangement between the persons interested. That decision is an authority for the proposition that in a warrant case, no order of acquittal could be passed unless a charge was framed and the accused could not be acquitted in respect of a non-compoundable offence merely because the complainant chose not to proceed with the matter. The said decision is binding

on me and it is clear that if the Magistrate was justified in framing the charges under S. 148 in the two cases, he had no jurisdiction to order an acquittal in respect of the said charges without giving an opportunity to the prosecution to lead all the evidence which the prosecution intended to lead. The Magistrate had no authority to stop the prosecutor from leading further evidence by allowing an application of the accused contending that the charges did not survive. The only section which authorised him to acquit the accused under Chapter XXI was S. 258. He could not pass an order under that section without following the mandatory procedure under S. 251-A to be followed by the Magistrate, after framing the charge when the accused pleaded not guilty, of proceeding to record all such evidence as may be produced in support of the prosecution. I have taken a similar view in Criminal Appeal No. 288 of 1968 decided by me on 27th June 1968 (Bom). It cannot be disputed in the present case that the objections raised by the prosecutor were completely brushed aside by the learned Magistrate and thereby the prosecution was denied the opportunity to lead further evidence in the matter.

8. Mr. Bhonsale further relies on the decision of this Court in AIR 1960 Bom 269, which lays down that in a case where an accused was charged both under S. 279 and under S. 337 of the Indian Penal Code, although the two sections overlap to some extent, the compounding of the offence under S. 337, Indian Penal Code, did not have the effect of preventing the prosecution of the accused under S. 279. This Court held, with respect, rightly, that the offences under Ss. 337 and 279 are distinct offences. Section 279 is essentially an offence against public safety. By S. 337, Penal Code, causing hurt to a person by an act of endangering life or personal safety of others is penalised. Mr. Bhonsale submits that in the present cases also whereas the offences under Ss. 323, 504 and 506 as well as 451 are all offences against individuals, the offences under Ss. 147 and 148 are offences against public tranquillity under Chap. VIII of the Penal Code. He submits that in these circumstances, the learned Magistrate erred in law in holding that because the offences under Ss. 323, 504, 506, 451 were compounded by the accused and the injured persons, the offence under S. 148, which is non-compoundable and which is a distinct offence against public tranquillity, did not sur-

vive, and he submits that the accused in both the cases could be prosecuted for the same.

9. His submission is supported by a decision of the Madras High Court in (1923) ILR 46 Mad 257 : (24 Cri L J 114). In that case the point which was raised was that the conviction of the accused under S. 143 and S. 447 of the Penal Code was illegal because the offence under S. 447 was compounded. The case was being prosecuted by the police against the accused for the alleged trespass in the land of one of the prosecution witnesses. The case was compounded between the accused and the prosecution witnesses and Wallace, J. held that in spite of this composition, the charge under S. 143 did not fall to the ground and observed:

"The common object charged against the accused as members of the unlawful assembly is the criminal trespass aforesaid. Petitioner contends that since the parties had a legal right to compound that trespass, such a composition has the effect of annulling the common object charged, and therefore the charge under S. 143, Penal Code, falls to the ground.

"I am not prepared to support this contention. The essence of the offence under S. 143, Penal Code, is the combination of several persons, united in the purpose of committing a criminal offence, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit. The compounding of an offence does not mean that the offence has not been committed, but that it has been committed, though the victim is willing either to forgive it or to accept some form of solatium as sufficient compensation for what he has suffered. The law allows prosecuting witnesses No. 1 to so deal with the offence of criminal trespass but not with the offence of five or more persons combining to effect that criminal trespass."

With very great respect, I cannot agree with this view. It is true that the offence under S. 143 is separately punishable and as such a distinct offence, but whether it is distinct from the offences which are compounded will depend on the facts and circumstances of each case. If, as in the present case, the charge-sheets as well as the charges framed are founded on the offences which are compounded, it is difficult to understand how the offences can be treated as distinct. It is true that all the facts together may constitute

offences under two different sections for instance, Ss. 323 and 148. But if the charge under S. 148 is based on the hurt caused to a particular person by the members of the unlawful assembly and if the person so injured can compound the offence under S. 323, under S. 345 of the Criminal P. C. and if such composition has the effect of an acquittal, it seems to me that it will be against reason to assume that in spite of the acquittal in respect of the same set of facts and for causing the same hurt, the members of the unlawful assembly who have all compounded the matter will be liable to be prosecuted for being members of the unlawful assembly. It cannot be disputed in the present case that the charge-sheets in both the cases as well as the charges assume that the unlawful assembly alleged had the object of committing an offence within the meaning of the third clause of S. 141 inasmuch as compoundable offences under Ss. 323, 504, 506 and 541 were committed by the members of the said assembly. With respect, Wallace, J. is right when he says that the compounding of an offence does not mean that the offence has not been committed. But he has not taken into account the effect of composition as laid down under S. 345, cl. (6) which says that the composition of an offence shall have the effect of an acquittal of the accused. I must say that the report in (1923) ILR 46 Mad 257 : (24 Cri L J 114) of the said judgment does not disclose all the facts and circumstances in which the charges under Ss. 143 and 447 were made in that case. It is difficult to understand from the report as to how in spite of the composition of the offence under S. 447, there was a conviction under Ss. 143 and 447 of the Penal Code, which conviction was upheld by Wallace, J. It may be that the circumstances in that case showed that the two offences were distinct. No point arose in that case as to whether the alleged offence under S. 447 was distinct from the offence under S. 143, although Wallace, J. has pointed out that on a construction of S. 143 itself an offence under S. 143 was distinct from the criminal offence which the persons agreed and intended to commit. With very great respect, if, as in the present cases, the compoundable offences committed by the members of the unlawful assembly are the foundation of the charge under S. 148, it is difficult to understand how the two are so distinct that if the compoundable offences are compounded, the offence under S. 148 will survive. It is

true that the offence under S. 148 is an offence against public tranquillity. It is an offence, one of whose ingredients is that the persons committing the offence must form an unlawful assembly as defined under S. 141. That definition has 5 categories of persons who may become members of unlawful assembly. But whether in the facts and circumstances of a particular case when the only provision of S. 141 applicable to the unlawful assembly is the third clause which says that if the common object of the persons composing the assembly is to commit an offence, and that offence itself is compoundable and it is compounded by the persons who can compound it under S. 345 of the Criminal P. C., it seems to me that it is not possible to hold that there can be a prosecution for an offence under S. 148. Section 146 lays down that whenever force or violence is used by an unlawful assembly or by any member thereof in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. So, for purposes of the definition of rioting also, it is necessary that the prosecution must establish that force or violence was used in prosecution of the common object of the unlawful assembly which, in the present cases, was only to commit the offence under Ss. 323, 504, 506 and 541, according to the charge-sheets. I therefore, respectfully disagree with the view taken by the Madras High Court in (1923) I L R 46 Mad 257=(24 Cri L J 114) and hold that after the offences under Ss. 323, 504, 506 and 541 in the two cases were compounded by the accused in the two cases and the injured persons, the accused could not be prosecuted further in the facts and circumstances of the present cases under S. 148 of the Indian Penal Code.

10. A similar view has been taken in 1964 (2) Cri L J 111 (Pat) which has been relied upon by the Judicial Magistrate for holding that the offence under S. 148 of the Indian Penal Code must fail. In that case also the prosecution case was that one Ramphal Gope and one other man came to the house of one Ramdeo Gope and demanded the price of onion seedlings which was due. Ramdeo told that he would pay the price when he would get the price of milk which he had supplied to others. This led to hot words. On the following day at about 8 or 8.30 a. m., Ramphal Gope and others, who were the accused in that case, came to the house of Ramdeo and demanded the price at

once. Ramdeo refused. The accused assaulted Ramdeo. The accused were convicted by the trial Court under S. 148 of the Indian Penal Code and sentenced to one year's rigorous imprisonment. They were also further convicted under S. 324 of the Indian Penal Code, but no separate sentence was passed. In spite of the fact that before the trial Court there was a compromise petition filed and the trial Court accepted the compromise so far as the offence under S. 323 of the Indian Penal Code was concerned, the accused appealed to the Sessions Judge and in appeal the convictions were altered from S. 148 to S. 147 and from S. 324 to S. 323 and the sentences were reduced. The accused applied in revision to the High Court and it was contended before the High Court that in view of the fact that the compounding was allowed in respect of the offence under S. 323 and the appellate Court had convicted the accused under S. 323 and S. 147, the convictions ordered by the Sessions Judge were illegal. In upholding the contention Syed Naqui Imam, J. found:

"Now that the appellate Court has found these petitioners guilty under sections 323 and 323/34 Indian Penal Code, in my opinion, the compromise petition can be put into effect even at this stage. There now remains the charge under S. 147, Indian Penal Code which is not compoundable. But it appears that the common object of the unlawful assembly was to assault. If the charge under Sections 323 and 323/34, Indian Penal Code fail on account of the compromise, it is obvious that the charge under S. 147, Indian Penal Code must also fail because the common object was to assault. For this reason I am satisfied that the petitioners must be acquitted of all the charges framed against them."

It is true that the judgment and the report do not show that any authorities were cited before him. But, with respect, the learned Judge appears to have taken the view that if the common object of the unlawful assembly was to commit an offence which is compoundable and is compounded, it is 'obvious' that the charge under S. 147 must fail.

11. The very fact that under S. 345 of the Criminal Procedure Code certain offences are allowed to be compounded shows the intention of the legislature that although these are offences punishable under the Indian Penal Code, the interest of society and public order do not require

[that the State should prosecute the persons concerned after the composition. That is why the effect of composition is said to be that of an acquittal. It cannot be argued that a person is acquitted of the offence and still he has committed an offence. It cannot also be argued that although each of the accused has not committed the offence, all of them together have committed the offence. I am, therefore, of the view that in the present cases, the Judicial Magistrate could not have framed a charge under S. 148 in view of the orders passed by his predecessor in the two cases on March 17, 1967. The proper procedure for his predecessor as well as for himself after the order of acquittal was passed was not to frame a charge under S. 148, Indian Penal Code, but to discharge the accused under section 251A (2), Criminal Procedure Code, because when the offences were compounded by the accused in the two cases and the prosecution witnesses who were injured in the course of the alleged rioting before any charges were framed; and once the order of acquittal was passed on the basis of the composition, the Magistrate ought to have considered the charge under S. 148 to be groundless within the meaning of clause (2) of Section 251A of the Criminal Procedure Code.

12. Mr. Bhonsale contended that even for arriving at this conclusion, the learned Magistrate ought to have allowed the prosecution to lead all evidence and since the Prosecutor was prevented from leading all the evidence, the Magistrate was in error in holding that the charge under S. 148 did not survive. But Cl. (2) itself envisages a stage when an opportunity is given to the prosecution before the evidence is led and the Magistrate is satisfied that the charge against the accused is groundless. The charge referred to in the case is the charge which is levelled in the report of the police upon which the Magistrate is required to follow the procedure under S. 251. I am therefore, of the view that the Judicial Magistrate ought to have discharged the accused in the two cases with respect to the charge under S. 148, Indian Penal Code, in exercise of his powers under S. 251A (2). Thus I have come to the conclusion in these two cases that the Magistrate had no jurisdiction to pass an order of acquittal and the proper order to pass after the compounding of the offences under sections 323, 504, 506 and 541 in the facts and circumstances of the case was to discharge the accused under S. 251A (2).

13. Apart from this, even assuming that the view taken by me regarding the effect of the composition of the compoundable offences in this case is not correct, the only order which can be passed is that the order of acquittal will have to be set aside and the matters will have to be sent back for retrial. It is well settled that a retrial is to be ordered by this Court only in exceptional circumstances and in the ends of justice. There are no exceptional circumstances in this case. There was a meeting of the bank which was attended by some of the citizens of Manmad who claimed to be merchants belonging to respectable families. They behaved in a way which does not credit to their respectability in causing hurt to some of them mutually, some of them went to the police. The police filed two charge-sheets against the 14 accused who are involved in the two cases. By the time the matter came up for hearing before the Court and even before any charge was framed, wisdom dawned on these persons and they settled their dispute and compounded the matters which could be compounded. Section 345 itself allows composition of offences under Ss. 323, 504, 506 without any permission from the Court. This means that it is the policy of the law that such offences should be allowed to be compounded if the parties so desire. It also means that the State cannot prosecute such persons as the effect of the composition is that of an acquittal. It appears that the predecessor of the Judicial Magistrate who passed the order of acquittal thought that the proper procedure would be to ask the parties to move the District Magistrate to withdraw the cases. The rozanamas in both the cases show that the cases were adjourned from time to time for more than four months after the parties moved the District Magistrate for withdrawal of the cases. It is rather surprising that there is nothing in the Rozanamas of these cases to show as to whether the District Magistrate refused to withdraw the cases or considered their request. The only thing that is patent is that the State had decided to file these two appeals against the order of the Judicial Magistrate. It seems to me that if the District Magistrate had applied his mind, he would have himself directed the Prosecutor to withdraw the cases because it is difficult to imagine how the State would be interested in prosecuting the accused in the facts and circumstances of the case. Having regard to all these facts and circumstances, I am of the view that

it will not be just or fair to order a retrial in these two cases, particularly when all the accused and the injured persons have treated the entire matter as closed.

14. In the result, both the appeals are dismissed.

Appeals dismissed.

1970 CRI. L. J. 1046 (Vol. 76, C. N. 260)

(CALCUTTA HIGH COURT)

A. K. DAS J.

Radhashyam De, Petitioner v. State, Opposite Party.

Criminal Revn. Case No. 1251 of 1965, D/- 7-3.1967.

Criminal P. C. (1898), Ss. 479A (6), (1), 476 to 479 — Applicability — Magistrate holding witness to have made false statements — False portion of evidence not pointed out by Magistrate — Magistrate merely referring to contradictory statements — Case for giving false statement directed to be started — Finding required by S. 479A (1) not made — Ingredients of perjury not satisfied — Hence complaint bad and is not under S. 479A — (Penal Code (1860), S. 191).

Where a Magistrate holding a witness to have made false statements, directs a case to be started, without making a finding as required under S. 479A (1), Criminal P. C. and he refers merely to contradictory statements of the witness but does not point out the false portion of the evidence, the ingredients of the offence of perjury are not satisfied. The complaint is not under S. 479A and is bad. (Paras 5 and 6)

Section 479A (1) requires recording of a finding that the witness has intentionally given false evidence at any stage of the proceeding and that for eradicating the evils of perjury and in the interests of justice it is expedient that he should be prosecuted. It is therefore incumbent on a Magistrate directing a case to be started against a witness to record such a finding. When he does not do so but gives only a direction to start the case, the complaint is not under S. 479A as the provisions of that section are not complied with and it is hence bad. A I R 1963 S C 816, Foll.; A I R 1966 S C 1863, Dist. (Para 5)

When he also does not state which portion of the evidence is false but merely refers to contradictory statements, the

requirements of the offence of perjury are not satisfied and therefore also the complaint is bad. (Para 6)

Cases Referred : Chronological Paras

(1966) AIR 1966 S C 1863 (V 53) =

1966 Cri L J 1503, Kuppa Goun-

dan v. M. S. P. Rajesh 5

(1963) AIR 1963 S C 816 (V 50) =

1963 (1) Cri L J 803, Sabir

Hossain v. State of Maharashtra 5

Sudhindra Kumar Palit, for Petitioner; Amiya Lal Chatterjee (Sr.), for Opposite Party.

ORDER.—This revisional application is directed against a complaint lodged by a Magistrate of Vishnupur under S. 476 of the Criminal Procedure Code.

2. The facts are as follows :

3. On 10th February 1965 a proceeding under S. 144, Criminal Procedure Code, was instituted in the Court of the Sub-divisional Magistrate, Vishnupur. The first party claimed that he purchased the disputed lands of Chaitanya and Radheshyam by a kobala dated 22nd December 1964 and the remainder share of Amulya from the heirs of Amulya by another kobala dated 2nd January 1965. The second party did not admit the execution of the kobalas. They claimed that Radheshyam, son of Ram Charan, inherited sixteen annas share of the property from his grandfather, Makhan Lal De and this Radheshyam settled the land on 16th April 1962 to Dhanraj by virtue of an unregistered amalnama and Dhanraj produced two pieces of paper purported to be receipts for rent and salami granted by Radheshyam. The learned Magistrate held that the case of the second party had no foundation at all and that Radheshyam made a misrepresentation on either of the two occasions. He held that he must have made a false statement in the affidavit dated 13th February 1965 or in the registered kobala dated 22nd December 1964. The learned Magistrate, therefore, directed that a miscellaneous case be started against him separately and asked him to show cause by April 15, 1965 why he should not be legally prosecuted for intentionally giving a false statement before a public servant either on February 13, 1965 when he swore an affidavit before B. C. Bhattacharjee, Magistrate, 1st class, Bishnupur, or on December 22, 1964, when he admitted the kobala before the Sub-Registrar, Bishnupur.

4. Mr. Palit, the learned Advocate for the petitioner, has raised two points and they are as follows :

(1) That the order is bad in view of sub-sec. 479A of the Code of Criminal Procedure: and

(2) in the absence of a clear statement of the complainant as to which portion of the evidence is false, the complaint is bad in law and the learned Magistrate should not have taken cognizance.

5. Point No. 1: Section 479A (6) provides that no proceeding shall be taken under Ss. 476 to 479 inclusive for the prosecution of a person for giving false evidence, if in respect of such person proceedings may be taken under this section. Section 479A (1) says that notwithstanding anything contained in Ss. 476 to 479 inclusive, for initiating a prosecution for perjury the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding that the witness has intentionally given false evidence in any stage of the judicial proceeding and that, for the eradication of the evils of perjury and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him. This view is supported by the Supreme Court decision in Sabir Hossain's case AIR 1963 S C 816. There is no such finding in the present case but only a direction for starting a miscellaneous case for the purpose. In a later decision of the Supreme Court in Kuppa Goundan v. M. S. P. Rajesh, AIR 1966 S C 1863 it has been held that the bar of cl. (6) will not apply to a case where perjury is detected not merely with reference to evidence adduced at the trial but with reference to evidence in some other distinct proceeding, not then brought before the Court. That decision, however, will not apply to the facts of this case. It was, therefore, incumbent on the learned Magistrate to record a finding at the time of delivery of the judgment in the S. 144 Criminal P. C. case that for the eradication of the evils of perjury and in the interest of justice it was expedient that such witness should be prosecuted for the offence which appeared to have been committed. The complaint is presumably not under S. 479A, Criminal P. C. as the provisions of that section have not been complied with and it is therefore bad in law and should be quashed.

6. Point No. 2: The learned Magistrate has not stated which portion of the evidence is false. He has merely referred to certain contradictory statements. But

that does not satisfy the ingredients of an offence of giving false evidence and on that ground also this complaint is bad in law.

7. In the result, this application succeeds and the proceeding now pending before the learned Magistrate is quashed.

8. The rule is made absolute.

Petition allowed.

1970 Cri. L. J. 1047 (Vol. 76, C, N. 251)
(DELHI HIGH COURT)

P. N. KHANNA AND RANGARAJAN, JJ.

Municipal Corporation of Delhi and another, Appellants v. Om Prakash, Respondent.

Criminal Appeal No. 7D of 1966, D/- 28.7.1969, against order of I class Magistrate, Delhi, D/- 21.10.1965.

(A) Prevention of Food Adulteration Act (1954), S. 16 - Sample of milk - Analysis revealing a small deficiency of 0.3% in solid fat - Test conducted after six months - Deficiency, held, only marginal - Accused entitled to benefit of doubt.

In a case where the chemical analysis of a sample of milk taken six months ago revealed a deficiency of 0.3% in solid fat and the accused pleaded that the deficiency was due to the delay in making the analysis:

Held, that even in addition to the fact of passage of time pleaded by the accused, the deficiency was merely marginal and negligible. The accused was entitled to the benefit of doubt. 1968 Jab LJ 213 (SC), Foll.; ILR (1965) 1 Punj 513, Rel. on.

(Paras 6, 13 & 14)

(B) Prevention of Food Adulteration Act (1954), S. 13 - Finality and conclusiveness of the report - Extent of, stated - Accused can still adduce evidence regarding factors affecting the result of the analysis.

The finality and conclusiveness of the report under S. 13 of the Prevention of Food Adulteration Act is only to the extent that the sample as sent to the Central Food Laboratory contained what the report disclosed and in the proportions stated therein. The accused will still be entitled to lead evidence to show that the article of food in question is not adulterated food. The factors which he can rely upon in such cases include the delay in analysis of the sample and its impact

on the result obtained. AIR 1962 Guj 11 & 1965-67 Punj L. R. 911, Foll. (Para 12)

Cases Referred : Chronological Paras

(1967) Cr. Appeal Nos. 235 and 235 of 1964, D. 115, 1967-1968 Lab L. J. 213 (SC), Malwa Co-op. Milk Union Ltd. v. Bihari Lal 15

(1965) ILR (1965) 1 Punj 513. Municipal Corpn. of Delhi v. Ghisa Ram 3

(1965) 67 Punj L. R. 911, Municipal Corpn. of Delhi v. Niraj Kumar 11

(1962) AIR 1962 Guj 11 (V-49) 1962 (1) Cri. L. J. 417, Mohan Lal Chharsal Mathuraya v. Vipin Chandra R. Gindhu 12

Bishambhar Dey, A. for Appellants; Mahraj Kishan Chauda, for Respondent.

S. RANGARAJAN, J.—This is criminal appeal filed by the Municipal Corporation of Delhi with special leave under S. 417 (3), Criminal P. C., against the acquittal of the respondent-accused by learned Magistrate First Class, Delhi of an offence punishable under the Prevention of Food Adulteration Act. A few relevant facts alone may be noticed.

2. A sample of cow's milk was taken by the Food Inspector on 15th April, 1961 according to the rules. After compliance with the formalities prescribed by law requisite drops of formalin were also added to the sample and it was sent to the Public Analyst for examination, which was conducted on 16th April, 1961. The sample is said to have been kept in a refrigerator till the examination. In spite of the same, according to the Analyst's report, the solid fat contained in the milk was said to be only 2.25% as against 3.5%. The complaint, however, was filed, for no accounted reason, as late as 23rd September, 1961. The accused was served on 12th October, 1961. The second sample of the milk left with the accused was sent for examination by the Director, Central Food Laboratory on 17th February, 1965 and was actually examined by him on 16th March, 1965. According to his certificate the solid fat contents were 3.2% as against the minimum requirement on 3.5%

After the receipt of the report from the Director, Central Food Laboratory, Calcutta the accused took the risk of examining Shri V. P. Bhatnagar, Public Analyst, appointed by the Delhi Administration, as a defence witness. It is explained at the bar that the Director of the Central Food Laboratory was not examined owing to

the cost, which is said to be prohibitive, for securing his presence for examination in Court. A mere perusal of the statement of D. W. 1 shows that he was fencing and was in no mood to admit even scientific facts which may be regarded as fairly well established. In one portion of his examination he went so far as to state as follows :—

"It is incorrect that the fat will decrease and non-fatty solids would increase. I have gone through the report of the Public Analyst Ex. P1 and the report of the Director, Central Food Laboratory, Calcutta (marked X) and find that the total solids of the two results are approximately the same, which shows that the sample has not changed much... Regarding non-fatty solids, when total solids is the same and the fat is higher in Director's report automatically non-fatty solids would be less, but the difference in the two reports is mainly due to the lapse of time."

3. It is worth repeating that whereas according to the Public Analyst the solid fat contents were 2.25% they were seen to be 3.2%, nearly 1% higher, a difference of nearly 50% over the results obtained by the Public Analyst. Whatever may be the attitude taken by D.W. 1 his evidence establishes that such variation in the result, obtained by the Public Analyst and by the Director of the Central Food Laboratory, was due to the lapse of time. We have referred to this portion of evidence prominently at the outset since to the same effect was the evidence of Dr. Sat Parkash, the Dairy Chemist in the Delhi Milk Scheme and a notified Public Analyst of the Delhi Administration, who was examined by the High Court of Punjab in Municipal Corporation of Delhi v. Ghisa Ram, the decision in which case is reported in ILR (1965) 1 Punj 513. The effect of the evidence of Dr. Sat Parkash was set out on pages 518-49 of the report, of which paragraphs (d) and (f) are relevant for our purposes.

They are worth setting out in extenso : "That by the end of that time, that is to say by the end of a week, bacterial development will start taking place which will break the fat contents thus causing reduction in the same and as the time passes such reduction will increase, and that if such a sample is then kept, at that temperature, for more than a week, say 10 days, it will then start decomposing and consequently become unfit for analysis."

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"That if to such a sample a preserving agent is added, it may maintain its total percentage of fat and non-fatty solids contents for the purposes of analysis for say four months and if then the sample of this type is placed in a refrigerator, it will keep such qualities for some more months, say another two months, which gives a total of about six months, during which period the sample will be available for the purposes of analysis without deterioration or decomposition affecting the same."

4. It may also be noticed that one Dr. A. Kannan, Public Analyst of the Delhi Municipal Corporation, was also examined by the Punjab High Court in that case and the effect of his evidence is set out at page 550 of the report as follows:—

"That increase in lactic acid by the lapse of time does not affect non-fatty solids so as to decrease them, does not affect fat at all, and with the increase of lactic acid by efflux of time there will be corresponding decrease in the lactose so that the total percentage of solids in curd will continue to be the same."

5. The High Court preferred the evidence of Dr. Sat Parkash as a disinterested expert witness to that of Dr. Khannan.

6. For the purpose of this appeal, it is even needless to go into this question because the difference between the result found by the Director of the Central Food Laboratory, Calcutta and the minimum required was so slender, namely, 0.3% that it may be regarded as negligible. We are even relieved of the necessity of going into the question whether the said deficiency of 0.3% noticed by the Director, Central Food Laboratory, Calcutta was only due to the passage of time. The ultimate opinion of the Director no doubt was that the sample of milk was adulterated in view of the said deficiency of 0.3%. But in such cases where the difference is slight and marginal, even in addition to the factor of passage of time (which is claimed by the accused-respondent as a sole factor in this case accounting for the deficiency noticed by the Director) there is room for doubt, the benefit of which has to go to the accused.

It is worth referring to an article by Shri S. N. Mitra of the Central Food Laboratory, Calcutta contributed to the Seventh Indian Standards Convention, at Calcutta, held in the year 1963. The margin of permissible error has been described as "tolerance". In spite of the standardi-

zation in the methods of analysis of food articles it was observed as follows by Shri Mitra:—

"In general, in all experiments involving analysis some tolerances are allowed. It would be rather difficult to lay down any hard and fast rule for such tolerance. Further, it is clear that the question of tolerances would arise mainly, in the case of border-line values. On the other hand, when the deviation in the results from the prescribed standards is large and appreciable, the question of allowable error will hardly arise."

7. Concerning tolerance vis-a-vis calculation of percentage of adulteration Shri Mitra stated:—

"In calculating the percentage of adulteration in a sample of food usually no tolerances are taken into account for personal or experimental errors. Percentage of adulteration is calculated on the results as obtained in the laboratory without giving any allowance. At times, calculation of percentage adulteration becomes very important from the point of view of the enforcement of purity and quality standards of foods . . . If, however, this deviation is more or less within the reasonable experimental error the question of giving the benefit of doubt would certainly arise."

8. In this case the milk solids other than milk fat were mentioned as 11.1% i.e. significantly above 8.5% referred to in the said article as being the statutory minimum.

9. Errors in taking samples also cannot be ruled out. Morris B. Jacobs in the Third Edition of his "The Chemical Analysis of Foods and Food Products" says on page 6.

"A most important matter to be considered by the food analyst, although not directly his province, is the proper sampling of the food or food product to be analyzed. There are probably as many incorrect determinations made because a sample was improperly taken as because of the combined errors of preparation of sample, manipulation, calculation of result, etc. The failure to obtain a proper sample makes a subsequent analysis worthless."

10. In order to get over the difficulties which stem from the report of the Director, Central Food Laboratory, Calcutta, the learned counsel for the Delhi Municipal Corporation relied heavily upon the finality of the certificate under S. 13 of the Act and claimed that since the certi-

ificate had characterised the sample as adulterated the accused be convicted on that basis alone.

11. The question of the conclusive nature of the said certificate or report has been the subject-matter of some decisions. Our attention has been drawn to the decision of *Falshaw C. J. & S. K. Kapur, J.* of the Punjab High Court in *Municipal Corporation of Delhi v. Niranjana Kumar*, (1965)³ 67 Pun L R 941. S. K. Kapur, J. speaking for the Division Bench observed as follows at page 943 :

"We would like to clarify that finality and conclusiveness has been attached only to the facts stated in the report of the Central Food Laboratory. It is not, however, conclusive as to any other matter and it may still have to be ascertained whether adulteration as disclosed in the report of the Central Food Laboratory was due to certain factors for which an accused could not be held responsible. In short the finality and conclusiveness is only to the extent that the sample as sent to the Central Food Laboratory contained what the report disclosed."

12. To a similar effect is the view regarding the conclusive nature of the said report taken in *Mohanlal Chhaganlal Mithaiwala v. Vipanchandra R. Gandhi* reported in AIR 1962 Guj 44. Shelat, J., speaking for the Division Bench held that

"what is final and conclusive in the certificate is the finding on an analysis or test of the constituents in the sample sent, their proportions, etc. The analyst has merely to give his opinion as to whether the article which he analysed has an excess or deficiency in constituents. The vendor would still be entitled to lead evidence or otherwise show that the article of food in question is not adulterated food."

The factors which the accused was held entitled to rely upon in such cases include the delay in analysis of the sample and its impact on the result obtained.

13. As already observed, it is needless for us to rely merely upon the delay in the present appeal as the sole factor which could probably account for the deficiency of 0.3% when it was tested by the Director of the Central Food Laboratory, nearly a year after the sample was taken.

14. The question of Dr. S. N. Mitra, as expressed in the said article shows that a doubt arises where the difference is marginal. It is appropriate, therefore, to give

the benefit of that doubt in such marginal cases to the accused.

15. Our attention has also been drawn to the unreported decision of the Supreme Court, decided on 14th August, 1967 in *The Malwa Co-operative Milk Union Limited v. Bihari Lal*, Cril. Appeals Nos. 235-236 of 1964 (SC). Referring to a deficiency of 0.1%, in one case, and 0.4% in the other, of the solids in the milk, his Lordship, Mr. Justice Hidayatullah (as he then was) observed as follows :

"It is not clear whether the analyst was able to isolate the fat content so successfully as not to have left room for this slight variation. The variation was thus borderline. However, the question is a general one; it is about the exercise of the powers of the High Court in revision to set aside acquittals in cases such as these."

16. In that case two samples were taken of buffalo's milk. An application to withdraw the cases was allowed in each case by the trying Magistrate. Subsequently, applications were made to the Sessions Judge for reporting the cases to the High Court. Those applications were dismissed. Then a further revision was filed in the High Court which ordered a re-trial setting aside the acquittal. In allowing the appeals against the order of the High Court, the Supreme Court further observed as follows :

"The variation in the solid contents of the milk prima facie were not so great as to merit attention even in the first instance and we think that the High Court might well have left the acquittal endorsed by the Sessions Judge to stand."

17. It is worth remembering in this case that the prosecution itself was launched on account of the Public Analyst's opinion that the solid fat contents were only 2.28% as against the minimum of 3.5%. But the sample, which was examined by the Director, Central Food Laboratory, even after so much delay, contained 3.2%, the deficiency being only marginal, namely, 0.3%. It seems to us that it is not proper to interfere with the order of acquittal passed by the learned Magistrate in this case.

18. In these circumstances, the appeal is dismissed.

Appeal dismissed.

1970 CRI. L. J. 1051 (Vol. 76, C. N. 262)

(DELHI HIGH COURT)

I. D. DUA, C. J.

State, Petitioner: v. Raghubir Das, Respondent.

Criminal Revn. Appln. No. 14 of 1969
D/. 20-5-1969.

(A) Criminal P. C. (1898), S. 204 (IB) — Accused pleading guilty and not raising objection in regard to non-compliance with S. 204 (IB) or that the names of witnesses were not included in the complaint — Held, that he could not raise objection in the proceedings in revision — Provisions are not mandatory so as to vitiate the trial by mere non-compliance in the absence of prejudice to accused.

(Para 10)

(B) Criminal P. C. (1898), S. 439 — Offence under Prevention of Food Adulteration Act — Conviction on basis of report of Public Analyst which was accepted by accused — Accused cannot raise technical objection in revision that the Analyst was appointed for the State of Punjab and not for the Union Territory of Himachal Pradesh — Position of accused in revision is not better than that in appeal preferred by him against conviction.

(Para 11)

(C) Criminal P. C. (1898), S. 439 (6) — Enhancement of sentence.

A sentence is to be enhanced only if it is manifestly inadequate so as to amount to miscarriage of justice. Except when the cause of justice demands its enhancement, High Court is reluctant to exercise its power of enhancement of sentence.

(Para 12)

(D) Criminal P. C. (1898), S. 537 — Provisions of S. 204 (IB) are not mandatory — Trial not vitiated if prejudice is not caused to accused.

(Para 10)

Cases Referred : Chronological Paras

(1961) AIR 1961 S C 1494 (V 48) =

1961 (2) Cri L J 696, M. V. Joshi

v. M. U. Shimpi 7

(1955) AIR 1955 S C 778 (V 42) =

1955 Cri L J 1642, Bed Raj v.

State of U. P. 7

(1945) AIR 1945 Lah 130 (V 32) =

46 Cri L J 566, Emperor v Ata-

Ullah 6

B. Sitaram, for Petitioner; A. C. Sood, for Respondent.

ORDER. — On 1-5-1969 I recorded an order in this case that the respondent was

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desirous of challenging his conviction and he was at that time desirous of concentrating his challenge to the validity of the appointment of the Public Analyst. Of course, he did not limit his challenge to that objection and also expressed his inclination to attack the legality of the trial. As the points sought to be raised seemed to me to be of importance which were likely to take sometime, I directed this case to be set down for hearing on my next visit.

2. The learned counsel for the respondent has, in the first instance, submitted that the accused was summoned by the trial Magistrate for 14-10-1968 and on the same day he was convicted. The grievance ventilated by the learned counsel is that the provisions of S. 204, (IB), Criminal P. C., were not complied with inasmuch as a copy of the complaint was not attached with the process issued to him.

3. The next challenge is based on the submission that in the complaint the names of all the witnesses to be produced by the prosecution were not included and the only witness mentioned therein has not been produced.

4. The third challenge is based on the question of appointment of Public Analyst. According to Shri Sud the report of the Public Analyst on the record shows that the said officer had been appointed for the State of Punjab and not for the Union Territory of Himachal Pradesh. Reference, in this connection, has been made to S. 9 (1) of the Prevention of Food Adulteration Act of 1954 according to which the Central Government or the State Government have to appoint by notification in the Official Gazette Food Inspectors for such areas as may be assigned to them. No notification having been produced on the present record, the report of the Public Analyst for the State of Punjab is according to Mr. Sud, a waste paper. Even otherwise this report (Exhibit P.D) does not bring home to the accused his guilt under the Food Adulteration Act. The counsel has, in this connection referred me to certain rules framed under the Food Adulteration Act. Specific reliance has been placed on Rule 22 of the said rules and emphasis has further been laid on Appendix B of the Rules which as per A. 05.01 lays down as under :

"Turmeric (Haldi) means the dried rhizome or bulbous root of the plants of genus *Curcuma* and species *longa* and

includes turmeric in whatsoever form. It shall be free from damage by insect pest, from lead chromate and other artificial colouring matter, and shall not contain more than 2.5 parts per million of lead. It shall conform to the following standards :

- (a) Omitted.
- (b) The characteristic boric acid test shall be positive.
- (c) Total ash shall be not more than 7 per cent.
- (d) Ash insoluble in Hcl shall exceed 1.5 per cent."

5. According to Shri Sud turmeric being 'spices' the quantity of sample to be sent to Public Analyst was to consist of 500 grms. or at least of 200 grms as provided in item No. 23 of R. 22. "Turmeric" is, according to Shri Sud, to be included in the word 'spices' whereas B. Sita Ram has controverted this submission by pointing out that in Appendix B 'spices' and 'Turmeric' have been used as separate items.

6. According to B. Sita Ram in the Court of the learned Sessions Judge the accused had not challenged the merits of his conviction and had merely confined his grievance to the question of the sentence being excessive. The accused on this premise, is stated not to be entitled to challenge the merits of his conviction as a respondent in the present proceedings. This contention is sought to be met by Shri Sud on the basis of S. 439 (6), Criminal P. C. and reliance for this right is placed on a Full Bench decision of the Lahore High Court reported in Emperor v. Ata-ullah, AIR 1945 Lah 130.

7. Lastly, the application for enhancement of sentence is opposed by the learned counsel for the respondent on the ground that the question of sentence pertains to the discretion of the trial Court and such a discretion should not ordinarily be interfered with. Reference, in this connection, has been made to *Bed Raj v. State of Uttar Pradesh*, AIR 1955 S C 776. The counsel has also made a passing reference to *M. V. Joshi v. M. U. Shimpi* AIR 1961 S C 1491, where a sentence of fine in the case of an offence under the Food Adulteration Act was held to meet the ends of justice.

8. In the case in hand when the accused appeared in the trial Court he did not make any grievance in regard to non-compliance with S. 204 (IV), Criminal P. C., nor did he raise any objection in regard to the non-inclusion of the names

of witnesses in the complaint. On the other hand, when he was questioned by the Court he accepted the Public Analyst's report as also the adulterated nature of the Haldi in question. Indeed, in the order of the learned Magistrate dated 14-10-1963 it is clearly specified that the accused pleaded guilty to the charge and the learned Magistrate had satisfied himself that this plea was voluntary and without any improper influence. In view of this plea the learned Magistrate sentenced the accused to six months imprisonment and a fine of Rs. 1,000/-.

9. On appeal, the learned Sessions Judge also expressly observed in his order that the only question agitated before him was that of sentence. It was further noted that the accused had admitted his guilt in the trial Court. Holding the adulteration to be of a very minor nature the learned Sessions Judge reduced the sentence to imprisonment already undergone which was for about 3 days and a fine of Rs. 100/-.

10. In my opinion, in view of the fact that the accused had pleaded guilty and had not raised any objection in regard to the non compliance with S. 204 (IB), Criminal P. C., it is not open to the accused in the present proceedings to re-agitate either the question of non-compliance with S. 204 (IB) of the Code or of the non-inclusion of the names of witnesses in the complaint. On the facts and circumstances of this case, assuming there were defects of procedure as suggested by the accused, they do not seem to have in any way caused prejudice to him. These provisions are not of such a mandatory character as would vitiate the trial by their mere non compliance even when they have caused no prejudice to the accused persons. This, however, must not be understood to mean that this Court sanctions deliberate non compliance of these provisions or that Courts trying cases can ignore them.

11. In regard to the question of the appointment of Public Analyst; here again, his report was accepted by the accused. If the adulterated character of the article of food is accepted by the accused then the technical objection raised on his behalf in this Court would also lose much of its importance. B. Sita Ram has, however, stated at the Bar that there is a notification appointing the Public Analyst of the Punjab to be a Public Analyst for Himachal Pradesh as well. He has not been able to produce that

notification in this Court as, according to him, he has not so far received its copy from his clients. The non-production of this notification in the trial Court, in my opinion, is primarily due to omission on the part of the accused person to raise the question there and also due to his having pleaded guilty. On the facts and circumstances of this case, I do not think it is necessary for this Court to adjourn these proceedings to enable B. Sita Ram to produce the necessary notification, though it appears to this Court that the counsel could, with due diligence, have secured its copy by now. On the view that I have taken, I do not consider it necessary for this Court to go into the question of how much quantity of the Haldi should have been sent to the Public Analyst for enabling him to submit his report in accordance with the Rules. The accused in exercising his right to show cause against conviction under S. 439 (6), Criminal Procedure Code, cannot claim to be placed in a better position than if he had himself challenged his conviction by preferring an appeal. Having pleaded guilty, he could not re-agitate questions which are now sought to be raised by his counsel under this sub section.

12. B. Sita Ram submits that the learned Sessions Judge has fallen into a legal error in assuming that the offence in question falls under S. 2 (1) (I) of the Food Adulteration Act, according to which an article of food is to be deemed adulterated if its quality or purity falls below the prescribed standard or if its constituents are present in quantities which are in excess of the prescribed limits of variability. The counsel adds that the present case is covered by section 2 (i) (b), according to which if the article contains any other substance which affects, or if the article is so processed as to affect injuriously the nature, substance or quality thereof, then it is to be deemed to be adulterated. In my view, on the present record it is not possible to hold that the learned Sessions Judge has fallen into any such error, the question is not so simple as is assumed by the counsel for the State. On revision, a sentence is to be enhanced only if it is manifestly inadequate so as to amount to miscarriage of justice. Except when the cause of justice demands its enhancement, this Court is reluctant to exercise its power of enhancement of sentence. The State does not seem to me to have made out a case of enhancement for the sentence on the existing record. The accused seems

to have suffered sufficiently for his lapse in not caring to see and guarantee that the Haldi in question which was sent for grinding did not get adulterated in that process. In future, I have little doubt that the accused would be careful enough to see that he does not contravene the provisions of the Prevention of Food Adulteration Act. This enactment, it may be realized by all those who deal in foodstuffs is intended to safeguard the health of the society as a whole including infants, invalids and old persons. No citizen in the present state of society is self-sufficient in the production of all the articles of food etc., needed by him. Those who manufacture or sell some of the articles of food have also to secure other such articles for themselves from elsewhere. They thus owe to themselves as much as they owe to the society that they do not sell to others adulterated articles of food just as they would expect to be supplied by other dealers unadulterated articles. The harmful consequences of selling adulterated articles of food are too obvious and have indisputedly too far-reaching consequences on the society as a whole to require elaboration and the harmful consequences can be visualised from more aspects than one.

13. For the foregoing reasons, this revision is dismissed.

Revision dismissed.

1970 CRI. L. J. 1053 (Vol. 76, C. N. 263)
(GUJARAT HIGH COURT)

N. G. SHELAT J.

State of Gujarat, Appellant v. N. Viswanatha, Project Manager of Oil and Natural Gas Commission at Cambay, Respondent.

Criminal Appeal No. 1111 of 1966, D/- 27-6-1969.

Shops and Establishments — Bombay Shops and Establishments Act (79 of 1948) (as applied to State of Gujarat), Ss. 61, 52 (a) and 7 (1)—Non-registration of establishment — Complaint must be filed within period of three months provided under S. 61 — Non-registration of establishment is not a continuing offence.

The essence of S. 61 of the Bombay Shops and Establishments Act is that if any employer or Manager of any such establishment were to be prosecuted under S. 52 (a) read with S. 7 (1) of the Act, it must be so done within a period

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of three months from the date when the existence of any such establishment came to be known to the Inspector in charge of the case. (Para 5)

The registration of an establishment is not made a condition precedent before taking any action for breach of the provisions of the Act. If, therefore, there is no specific provision for enforcing registration thereof, it cannot make non-registration of the establishment continuing offence. If the Inspector wants to so enforce by following the proviso to S. 52, he must obtain first the conviction of the owner of the establishment, and for that he must file the complaint within the period provided in S. 61 of the Act. If he does not of his own get it registered and if for some reason, the Inspector fails to take action for non-registration thereof within certain time prescribed, there is nothing to prevent the Inspector to gather information and register the establishment in his record. But it is clear that on that ground it cannot be taken as a continuing offence so as to treat this period prescribed for filing the complaint in Court as non-existent. If therefore, he were to file a complaint after a period of three months from the date of his knowledge of its existence, the Court is not entitled to take cognizance of any such offence as the complaint can be said to be barred by law under S. 61 of the Act. The proviso to S. 52 does not in any way suggest any breach of the provisions contained in S. 7 (1) of the Act as in any way of a continuing nature. And all that it provides is to entitle the Inspector to take action against any such employer who continues to commit the same breach even after he has been already convicted by the Court for the said offence under S. 7 (1) of the Act. (Para 5)

An establishment was started within certain municipal limits in the year 1960 but it was not registered as required under S. 7 (1). A notice dated 11th June 1965 as to resolution passed by the Executive Committee of the Municipality was sent to the director of the company about the same having not been registered within the time limit prescribed under S. 7 (4). As no steps were taken in that direction another letter dated 7th December 1965 was sent to the director of the company calling upon him to get the same registered within three days from the date of the receipt of the letter. That led the manager of the company to send an application form duly filled with a re-

quest to register the same. The Inspector of the Municipality after verifying the application made a report to the Executive Committee for obtaining sanction for the prosecution for the breach of S. 7 (1). A resolution dated 11th March 1966 was passed by the Committee whereby the sanction for prosecution was accorded and a complaint for an offence under S. 52 (a) read with S. 7 (1) was filed on 18th March 1966.

Held, that the complaint was beyond the period of three months provided under S. 61. It was barred by time. The Court could not take cognizance of any such offence under S. 61 of the Act. (Para 4)

At any rate on 11th June 1965 the Municipality and its officers including the complainant Inspector knew about the non-registration of this establishment and incidentally the manager having committed an offence in respect thereof under S. 52 (a) read with S. 7 (1) of the Act. That could, therefore, be taken to be the starting point for the purpose of counting the period of limitation provided under S. 61 of the Act for any complaint to be filed in respect thereof. (Para 4)

K. M. Chhaya, for Appellant; A. D. Shah, for Respondent.

JUDGMENT.— This appeal arises out of an order passed on 13th September 1966, by Mr. H. C. Shah, Judicial Magistrate, First Class, Cambay, in Criminal Case No. 728 of 1966 (Summary Case No. 1489 of 1966) whereby the respondent accused came to be acquitted under S. 245 (1) of the Criminal P. C., in respect of an offence under S. 52 (a) read with S. 7 (1) of the Bombay Shops and Establishments Act, 1948 as applied to the State of Gujarat.

2. The facts of the case are quite simple. The Oil & Natural Gas Commission was established under Oil & Natural Gas Commission Act, 1959 and it has its office at Cambay. The clearing and forwarding section thereof was started in 1960 within the Municipal limits of Cambay to which the Bombay Shops and Establishments Act, hereinafter referred to as the 'Act', came to be applied with effect from 1-4-1950. Though the aforesaid section of the O. N. G. C. was started in the year 1960, it was not registered as required under S. 7 (1) of the Act. It appears that a notice dated 11-6-65 as to the resolution passed by the Executive Committee of the Municipality of Cambay was sent to the Director of the O. N. G. C. at Cambay drawing his attention about

the same having not been registered within the time-limit prescribed under S. 7 (4) of the Act. No steps appear to have been taken in that direction and that led the Chief Officer of the Municipality of Cambay to send another letter to the Director of the O. N. G. C. Cambay, calling upon him to get the same registered within 3 days from the date of the receipt of his letter failing which the criminal proceedings under S. 7 (1) of the Act would be taken against him. That letter is at Ex. 14 and is dated 7-12-65. That led the Assistant Manager of the clearing and forwarding section of the O. N. G. C. at Cambay to send an application form duly filled in with a request to register the same under the provisions of the Act. The registration fee amounting to Rs. 2.50 was also sent therewith. It was also declared by the Manager Oil & Natural Gas Commission that he was running an office of the Oil & Natural Gas Commission at Railway Yard, Cambay, under the Bombay Shops & Establishments Act. The statement under S. 7 (1) was duly filled in by the Manager Mr. N. Vishwanathan of the said Commission.

3. Mr. Rasiklal Mansukhlal Divanji has been working as an Inspector appointed under the provisions of the Act and he has been in the service of the Municipality of Cambay. After verifying the application received from the respondent, he found, that the establishment was started in the year 1960. Thereupon he made a report to the Executive Committee for obtaining sanction for the prosecution of the accused for breach of the provisions contained in S. 7 (1) of the Act. A resolution No. 832, dated 11-3-1966 was passed by the Managing Committee whereby the sanction as required under S. 52 of the Act was accorded for prosecuting Shri Vishwanathan, the Manager of the establishment, for contravening the provisions of S. 7 (1) of the Act so as to be liable for an offence under S. 52 of the Act. That resolution is at Ex. 13 and it is dated 11-3-66. In pursuance thereof, the complaint was filed by the Inspector Shri Rasikbhai at Ex. 28 in the Court of the Judicial Magistrate, First Class at Cambay. The accusation against the accused was that he had commenced the work of his establishment relating to the clearing and forwarding section of the O. N. G. C. at Cambay since 1960 and that he had failed to send to the Inspector of the local area the statement in prescribed form together with the registration fees within

30 days of the commencement and to obtain the registration certificate and that way made himself liable for an offence under S. 52 (a) read with S. 7 (1) of the Act. The accused denied to have committed any offence, as according to him, it was not an establishment contemplated under the Act and that complaint filed against him was not in time. The learned Magistrate on a consideration of the evidence adduced in the case, found that the clearing and forwarding section of the O. N. G. C. at Cambay was not an establishment under S. 2 (8) of the Act and, therefore, it was not required to be registered under S. 7 (1) of the Act. On a question of bar of limitation under S. 61 of the Act, he held that the offence of non-registration of the establishment was in the nature of a continuing offence and that the commission of the offence took place from day-to-day. On that basis, he found that the complaint was in time. In the result, the learned Magistrate found the offence not established against the respondent-accused and acquitted him. Feeling dissatisfied with that order, the State has come in appeal before this Court.

4. Before Mr. Chhaya, the learned Assistant Government Pleader for the State, took up the consideration of the question as to whether the clearing and forwarding section of the O. N. G. C. at Cambay fell within the meaning of the term "establishment" defined in the Act, Mr. Shah, the learned advocate for the respondent, requested this Court to consider the other question in respect of which the finding was recorded viz. that the complaint was not barred by time under S. 61 of the Act. According to him, that goes to the root of the matter, and in case this Court agrees with him, the other question would not arise to be considered. This question has, therefore, been taken first. Now Mr. Chhaya says that this clearing and forwarding section of the O. N. G. C. is an establishment falling within the definition of S. 2 (8) of the Act and obligation to have the same registered would arise on the employer or the Manager under S. 7 (1) of the Act. Section 7 (1) provides as under :

"7 (1). Within the period specified in sub-s. (4), the employer of every establishment shall send to the Inspector of the local area concerned a statement, in a prescribed form, together with such fees as may be prescribed, containing —

(a) the name of the employer and the manager, if any;

(b) the post address of the establishment ;

(c) the name, if any, of the establishment ;

(d) the category of the establishment, i. e., whether it is a shop, commercial establishment, residential hotel, restaurant, eating house theatre or other place of public amusement or entertainment ; and

(e) such other particulars as may be prescribed."

Sub-section (4) of S. 7 provides that the statement together with the fees shall be sent within thirty days from the date mentioned in Col. 2, viz the date on which the section comes to be applied in the local area in respect of an establishment existing in local area. Non-compliance of this provision contained in S. 7 (1) is made punishable under S. 52 (a) of the Act which says that if any employer fails to send to the Inspector a statement within the period specified in S. 7, the employer and the manager shall, on conviction, each be punished with fine which shall not be less than twenty-five rupees and which may extend to two hundred and fifty rupees ; provided that, if the contravention of the provisions of sub-s. (1) of S. 7 is continued after the expiry of the tenth day after conviction, the employer shall on conviction be punished, with a further fine which may extend to ten rupees for each day on which the contravention is so continued. Then comes the relevant S. 61 which says that no Court shall take cognisance of any offence under this Act or any rule or order made thereunder, unless complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of an Inspector. Now, before we actually consider the question as to whether the offence was in the nature of a continuing one or not, we may first determine as to whether the complainant-Inspector had come to know about the alleged commission of the offence, and if so, to fix the starting point for commencing the prosecution of the accused before the Court. I have already made reference to the correspondence that appeared to have taken place between the parties and more particularly the letter Ex. 14 dated 7-12-65 sent by the Chief Officer of the Cambay Municipality to the respondent-accused wherein a clear reference about the resolution No. 263 dated 11-6-65 passed by the Executive Committee of the Municipality

has been made and under which a notice was sent to the respondent for non-registration of the alleged establishment within the time prescribed for the same. Obviously therefore, the Municipality of Cambay had come to know about the existence of this establishment run by the respondent long before 11-6-65 let alone the admission of the complainant saying that this establishment was started in the year 1960. In fact, Mr. Rasiklal, the Inspector of the Municipality, has clearly admitted in his cross-examination that the establishment had commenced its work before 11-6-65 and that there was no doubt about the fact that it required registration. Then he has stated that it was not that as there was doubt that they took action only after the respondent made the application. Thus, at any rate on 11-6-65 the Municipality and its officers including the complainant-Inspector knew about the non-registration of this establishment and incidentally the respondent having committed an offence in respect thereof under S. 52 (a) read with S. 7 (1) of the Act. That can, therefore, be taken to be the starting point for the purpose of counting the period of limitation provided under S. 61 of the Act for any complaint to be filed in respect thereof. The complaint was filed on 18-3-66 and since it was beyond the period of three months provided under S. 61, it was barred by time. The Court could not take cognizance of any such offence under S. 61 of the Act.

5. The learned Magistrate, however, took the view that this was in the nature of a continuing offence and, therefore, there was hardly any question of the limitation contemplated under S. 61 of the Act. According to him, the complaint filed on 18-3-66 in respect of an offence said to have been committed by the respondent-accused on 1-1-66 — the date on which he had sent statement contemplated under S. 7 (1) of the Act for obtaining the registration of the said establishment is in the nature of a continuing offence. As to how the learned Magistrate thought it to be in the nature of a continuing offence, he has given no reasons whatsoever. It was, however, pointed out by Mr. Chhaya, the learned Assistant Government Pleader for the State, that the proviso to S. 52 of the Act indicates the nature of such an offence as of a continuing character till such time that any such employer or manager of the establishment does not comply with the requirements of registration under S. 7 (1) of the Act. The

proviso does not in any way suggest any breach of the provisions contained in S. 7 (1) of the Act as in any way of a continuing nature and all that it contemplates is that if the contravention of the provisions of sub-s. (1) of S. 7 is continued after the expiry of the tenth day after conviction, the employer shall on conviction be punished, with a further fine which may extend to ten rupees for each day on which the contravention is so continued. In other words, all that it provides is to entitle the Inspector to take action against any such employer who continues to commit the same breach even after he has been already convicted by the Court for the said offence under S. 7(1) of the Act. On the contrary, the right to take action, with the purpose of seeing that the employer complies with the provision of S. 7 (1) of the Act, is given, but that can only be done after his conviction is obtained for the first offence. This proviso does not take away the effect of the period of limitation contemplated under S. 61 of the Act for filing a complaint in respect thereof against any such person. The object behind providing for such period of limitation for filing any such complaint in Court appears to be of a two-fold character. One is to see that the offence will not be allowed to become stale and secondly, since the offences of this nature are not serious, in fact they are of a technical or administrative nature, such bar is necessary to avoid any harassment to the persons. Such a bar of limitation is also meant to keep the prosecuting authorities very vigilant and active if they want to bring the offenders to book and see that the provisions of the Act are properly observed. The Legislature has by making the necessary amendment appears to have enlarged the scope of the provision by saying that the period of three months shall commence from the date on which the alleged commission of the offence came to the knowledge of the Inspector. The essence of S. 61, therefore, is that if any employer or manager of any such establishment were to be prosecuted under S. 52 (a) read with S. 7 (1) of the Act, it must be so done within a period of three months from the date when the existence of any such establishment came to be known to the Inspector in charge of the case. It was pointed out by Mr. Chhaya, the learned Assistant Government Pleader, that if no such complaint were filed within any such period fixed under S. 61 of the Act, there is no other power to make any such employer or Manager of

the establishment to obey and follow the requirements contemplated under S. 7 (1) of the Act, and when that is so, there must be some machinery to make them get their establishment registered and that can only be done if such an offence were treated as of a continuing nature. We find no doubt no provision whereby any such Inspector or authority under the Act can enforce the requirement to be carried out by any such employer or manager of the establishment. But if we were to peruse the provisions of the Act, it appears that by no provision in the Act registration is made the basis of the application of the other provisions of the Act, provided no doubt the establishment would be subject to such provisions of the Act. It is not that other provisions which are intended for the benefit of the workers etc. cannot be applied on the ground that a particular establishment has not been registered under S. 7 (1) of the Act. Any establishment falling within S. 2 (8) of the Act would remain the same whether it is registered or not and in case it is not registered, it remains open to the State Government or an Inspector appointed under the Act within the local limits for which he is appointed, to ascertain the same by even entering, at all reasonable times and with such assistants, if any, being persons in the service of the Government or of any local authority as he thinks fit, any place which is or which he has reason to believe is an establishment as contemplated under S. 49 (a) of the Act. Clause (b) thereof then empowers him to make such examination of the premises and of any prescribed registers, records and notices, and take on the spot or otherwise evidence of any persons as he may deem necessary for carrying out the purposes of the Act. In the event of any such Inspector having reason to suspect that any employer of an establishment to which the Act applies has committed an offence punishable under S. 52 or 55, he may seize, with the previous permission of such authority as may be prescribed, such registers, records or other documents of the employer, as he may consider necessary, or for prosecution, and then clause (c) thereof says that he can exercise such other powers as may be necessary for carrying out the purposes of the Act. This section nowhere says that he cannot exercise his powers under S. 49 in respect of any establishment which has not been registered under the provisions of the Act. The powers of the Inspector can be exercised if there

existed any such establishment which falls within the ambit of the provisions of this Act and he can ascertain whether the other provisions of the Act so applied are carried out by the same. In case of any action taken against any such employer or manager of the establishment, it would be no doubt open to the accused to say that it was not an establishment falling under S. 2 (8) of the Act. But that does not mean that the Inspector cannot take any such action for the enforcement of other provisions against any such establishment under the Act. As I said above, the registration of an establishment is not made a condition precedent before taking any action for breach of the provisions of the Act. If, therefore, there is no specific provision for enforcing registration thereof, it cannot make non registration of the establishment a continuing offence. If the Inspector wants to so enforce by following the proviso to that section, he must obtain first the conviction of the owner of the establishment, and for that he must file the complaint within the period provided in S. 61 of the Act. If he does not of his own get it registered and if for some reason, the Inspector fails to take action for non registration thereof within certain time prescribed, there is nothing to prevent the Inspector to gather information and register the establishment in his record. But it is clear that on that ground it cannot be taken as a continuing offence so as to treat this period prescribed for filing the complaint in Court as non-existent. If therefore, he were to file a complaint after a period of three months from the date of his knowledge of its existence, the Court is not entitled to take cognizance of any such offence as the complaint can be said to be barred by law under S. 61 of the Act. The complaint was, therefore, barred by time and liable to be rejected. The finding in that respect arrived at by the learned Magistrate is not correct. No cognizance of the offence can, therefore, be taken by the Court and the accused was liable to be discharged.

6. In this view of the matter, it becomes unnecessary to go into the question whether the clearing and forwarding section of the O. N. G. C. at Cambay is an Establishment as contemplated under S. 2 (8) of the Act. The learned advocates appearing for both the sides agree that the finding of the Court that it did not amount to establishment under S. 2 (8) of the Act should not be treated as final and that it would be open to a challenge in Court

by the accused since we do not go into that question.

7. In the result, therefore, the order passed by the learned Magistrate stands and the complaint is dismissed.

Complaint dismissed.

1970 CRI. L. J. 1058 (Vol. 76, C N. 264) =

AIR 1970 ANDHRA PRADESH 293
(V 57 C 46)

ANANTANARAYANA AYYAR J

In re Salem Govindappa Chetty, Petitioner.

Criminal Revn. Case No 747 of 1968 and Criminal Revn. Petn No 625 of 1968, D/- 25-6-1969, from order of S J. Chittoor, D/- 12-12-1968

(A) Prevention of Food Adulteration Act (1954), S. 2 (i) (j) — Words 'prescribed in respect thereof' — Mean colouring matter permitted and not prohibited.

(Para 8)

(B) Prevention of Food Adulteration Act (1954) S. 2 (i) (j) — Word "and" — It is to be interpreted as "or" — When "and" is read as "or" in the section it gives meaning to it — If not it leads to absurdity — AIR 1965 Ker 96, Rel. on; AIR 1954 SC 496, Ref.; AIR 1953 SC 278 and 1964-2 All ER 988, Disting.—(Words and Phrases — Word "and" — Illustration of its use as "or").

(Para 15)

(C) Prevention of Food Adulteration Act (1954) S. 2 (i) (j) and (l) — Article containing colouring matter which is altogether prohibited — Case falls under S. 2 (i) (j) and not under S. 2 (i) (l).

(Para 16)

(D) Prevention of Food Adulteration Act (1954) S. 16 (1) read with Ss. 7 and 2 (i) (j) — Sentence — Accused a petty shop-keeper aged over 60 years — Using coal-tar dye as colouring matter — Evidence as to quantity of colouring matter used not on record — Lower Court imposing minimum sentence prescribed though it also felt that it was hard case — Conviction set aside and accused released under S. 4 (1) of Probation of Offenders Act on his entering into bond for Rs. 2000 with two sureties each for like sum—(Probation of Offenders Act (1958), S. 4).

(Para 18)

Cases Referred: Chronological Paras

(1968) Cri R C No 121 of 1968

(Andh Pra)

17

(1966) Cri R C No 521 of 1966

(Andhra Pra)

17

(1965) AIR 1965 Ker 96 (V 52) =
1965 (1) Cri LJ 445, Food Inspector Trichur Municipality v

Paul

8, 10, 12, 15

- (1964) 1964-2 All ER 988 = 1965
AC 430, Posenbaum v. Burgoyne 14
(1959) AIR 1959 SC 198 (V 46) =
1959 SCR 1287, Siraj-ul-Haq Khan
v. S. C. Board of Waqf U. P. 10
(1957) AIR 1957 SC 699 (V 44) =
1957 SCJ 607, State of Bombay
v. R. M. D. Chamarbaugwala 10
(1954) AIR 1954 SC 496 (V 41) =
1954 Cri LJ 1333, Tolaram v.
State of Bombay 11, 15
(1953) AIR 1953 SC 278 (V 40) =
1953 Cri LJ 1116, Seksaria Cotton
Mills Ltd. v. State of Bombay 13
(1953) AIR 1953 Raj 46 (V 40) =
ILR (1952) 2 Raj 207, Bishan
Singh v. State of Rajasthan 10
(1952) AIR 1952 SC 324 (V 39) =
1952 Cri LJ 1503, Shamrao v.
District Magistrate, Thana 10
(1951) AIR 1951 All 119 (V 38) =
1951 All LJ 60 (FB), Sukhanandan
v. Surajbali 10

P. Chennakesava Reddi, for Petitioner, D. Reddippa Reddi for the Public Prosecutor on behalf of the State

JUDGMENT: In C. C. No. 57 of 1968 on the file of the Judicial First Class Magistrate, Madanapalli, the Food Inspector (Sanitary Inspector) of Madanapalli Municipality filed a complaint against S. Govindappa Chetty, alleging that the latter exposed for sale Mysorepak and sold samples of it to the Food Inspector and that on analysis it was found to be adulterated because it was found to contain metanil yellow coal-tar-dye and also to contain Kesari Dhall flour which was prohibited under the Prevention of Food Adulteration Act (Act XXXVII of 1954) and the Prevention of Food Adulteration Rules 1955. After full trial the learned Magistrate found that the Mysorepak was adulterated and it was containing metanil coal-tar-dye and accordingly convicted him under S 16 (1) (a) (i) read with Ss. 7 and 2 (i) (i) of the Prevention of Food Adulteration Act (hereinafter called the Act). He found that the case of adulteration was not proved on the basis of Kesari Dhall flour. He also held that the case did not fall under Section 2 (i) (1) of the Act, and awarded a sentence of six months' simple imprisonment and a fine of Rs 1000/- and in default to suffer simple imprisonment for two months.

2. The accused filed Cri A. No. 95/68 before the learned Sessions Judge, Chittoor, and the latter agreed with the finding of the trial Judge that the accused had used the prohibited coal-tar-dye, and confirmed the conviction and sentence. The accused filed this Revision Petition

3. There is a concurrent finding of the two lower courts based on convincing evidence that the accused sold Mysorepak to the Food Inspector (P. W. 1)

on 30-9-67 at 7-00 P.M. and that it contained metanil yellow coal-tar-dye, as per the report of the Public Analyst (Ex. P. 4). The correctness of that finding of a fact, is not challenged before me by the learned advocate for the accused. I see no reason to disagree with that concurrent finding of fact.

4. The two points urged by the learned advocate for the accused Sri Chennakesava Reddy, are:

(1) That no offence of adulteration contemplated in Section 2 (i) (1) of the Act has been proved and

(2) If at all there is any offence, it is only under Section 2 (i) (1) of the Act.

(3) that this is a fit case for action under Section 4 of the Probation of Offenders Act.

Contention (1):— The relevant portion of Section 2 of the Prevention of Food Adulteration Act runs as follows:

"2. In this Act, unless the context otherwise requires:

(i) "Adulterated" — an article of Food shall be deemed to be adulterated:

xx xx xx

(i) if any colouring matter other than that prescribed in respect thereof and in amounts not within the prescribed limits of variability is present in the article;

xx xx xx

(1) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability;"

5. Part VI of the Rules framed under the Act bears the heading 'Colouring Matter' and comprises Rules 23 to 31. The relevant rules run as follows:

"23. Unauthorised Addition of colouring matter prohibited.— The addition of colouring matter to any article of Food except as specifically permitted by those rules, is prohibited.

xx xx xx

26 Natural colouring matters which may be used:

(Except as otherwise provided in the rules) the following natural colouring principles whether isolated from natural colours or produced synthetically may be used in or upon any article of food.

xx xx xx

27. Addition of inorganic matters and pigments prohibited.— Inorganic colouring matters and pigment shall not be added to any article of food.

28 Coal-tar dyes which may be used.— No coal-tar dyes or a mixture thereof except the following shall be used in food:

xx xx xx

Metanil yellow is not one of the coal-tar dyes mentioned under this rule.

"29. Use of permitted Coal-tar dyes prohibited:

Use of permitted coaltar dyes in or upon any food other than those enumerated below is prohibited:

xx xx xx

30. Maximum limit of permitted colours: The maximum limit of permitted coaltar colours or mixture of permitted coaltar colours which may be added to any food shall not exceed 0.2 gramme per kilogram of the final food or beverage for consumption."

As per S 2 (xii) of the Act, "prescribed" means prescribed by rules made under this Act. Part VI, of the rules framed thereunder contains prohibition regarding colouring matters, as follows:

(a) Colouring matter which is not specifically permitted by the rules

(b) Inorganic colouring matters and pigment.

(c) Coaltar dyes other than those mentioned in Rule 28, and which are permitted only in the articles of food mentioned in Rule 29 and to the extent mentioned in Rule 30.

6-7. Rules specifically permitting addition of colouring matter run as follows

Natural colouring matters which are specified in Rule 26. Coaltar dyes are specified in Rule 28 and are restricted to the articles of foods mentioned in rule 29 whose maximum limit is fixed in Rule 30 and whose purity is fixed by Rule 31.

8. In the present case, metanil yellow is a coaltar dye. It is not mentioned in Rule 28 and therefore it is specifically prohibited by Rule 28. As it is not specifically permitted it is also prohibited under Rule 23. The word "prescribed" as used in S. 2 of the Act, has not been further defined. In Chambers's Dictionary the meaning of the word "prescribe" has been given as follows. "To lay down as a rule or direction to give as an order... To limit, set bounds to". The first part of Section 2 (i) (i) of the Act can be expanded as follows: 'If any colouring matter other than that prescribed in respect of which direction has been given or laid down by the rules made under this Act'. It will be observed that regarding metanil yellow, direction is effectively found in Rules 23 and 28, prohibiting its use, as it is a coaltar dye other than what is enumerated in Rule 28. Obviously the words "prescribed in respect thereof" in Section 2 (i) (i) mean only colouring matter which is permitted and not prohibited by the rules, for only then, the words can refer to any adulteration. It is agreed by the learned advocate for the accused and the learned Public Prosecutor that the first part which comes before the word "and" refers to colouring matter which is permitted by the rules. For convenience, I shall refer to the portion in Rule 2 (i) (i) as part (1) and the words coming after "and" as

part (2) of Rule 2 (i) (i). Sri Chennakesava Reddy, the learned counsel for the accused, contends as follows. The offence under section 2 (i) (i) of the Act, can be committed only if the act concerned, fulfils the requirement of part No. 1 and also fulfils the requirement of Part No. 2 in section 2 (i) (i) of the Act. In the present case, the requirement of part No. 1 is fulfilled, but the requirement of Part No. 2 is not proved to have been fulfilled. The word "and" has got to be given dictionary meaning and read conjunctively and not disjunctively so as to give the meaning of "or". The same contention was urged before the learned Sessions Judge. He rejected this contention holding that the word "and" has the meaning of "or". The learned Judge relied on a decision in Food Inspector, Trichur Municipality v. Paul, AIR 1965 Ker 96.

9. When Part (1) is fulfilled and the presence of colouring matter (metanil yellow) is not permitted at all and is positively prohibited, it means that its limit of variability is such that anything in excess of Zero, is not within the prescribed limit of variability. In other words, the permitted limit of the colouring matter in the first part is Zero and if the colouring matter is found in any quantity whatsoever positively it is in excess of the prescribed limit of variability. When any matter is completely prohibited by Part (1), there can be no need for any additional provision in the second part in Section 2 (i) (i) of the Act for that same matter. But the second part of Section 2 (i) (i) would certainly be applicable to cases of items of colouring matters which are permitted by the rules and for which, rules prescribe limits of variability in figures (e.g.) as in Rule 30 and in respect of coaltar dyes which are specifically permitted under Rule 28.

10. The learned Public Prosecutor contends that the word "and" in Section 2 (i) (i) of the Act has to be read as "or" as literal interpretation of the word "and" as conjunctive would lead to an absurdity viz., that a totally prohibited colouring matter may be used than the prescribed limits. This contention of the learned Public Prosecutor is supported by the decision in AIR 1965 Ker 96. In that case, some Jam Roll was found to contain a non-permitted coal-tar-dye, Rhodamine 'B', which is not one of the dyes specifically mentioned in Rule 28. The learned Judge extracted portions from the following decisions: Shamrao v. District Magistrate Thana AIR 1952 SC 324, Sirai-ul-Haq Khan v. S. C. Board of Waqf, U. P., AIR 1959 SC 198, State of Bombay v. R. M. D. Chamarbaugwala, AIR 1957 SC 699, Bishan Singh v. State

of Rajasthan, AIR 1953 Raj 46 and Sukha-nandan v. Surajbali, AIR 1951 All 119 (FB). The following is the extract made by the learned Judge from the decision in AIR 1952 SC 324, while interpreting Section 3 of the Public Safety Measures Act.

"It is the duty of courts to give effect to the meaning of an Act when the meaning can be fairly gathered from the words used, that is to say, if one construction will lead to an absurdity while another will give effect to what common sense will show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided."

Anna Chandy, J., has given various instances of reported decisions where the word "and" had to be interpreted as "or"

11. Shri Chennakesava Reddy relies upon a decision in Tolaram v. State of Bombay, AIR 1954 SC 496. In that case Section 18 (1) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, came up for interpretation. The Supreme Court observed as follows:

"It may be here observed that the provisions of section 18 (1) are penal in nature and it is a well-settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature"

12. This principle would be applicable to the present case if there are two possible and reasonable constructions which can be put upon the provision of S 2 (i) of the Act. The principle would not apply in the present case, if the word "and" were read as conjunctive. There is not even one possible reasonable construction, and there is only absurdity as pointed out by the learned Judge in AIR 1965 Ker 96

13. Another decision relied upon by Sri Chennakesava Reddy, is Seksaria Cotton Mills Ltd. v. State of Bombay, AIR 1953 SC 278. Therein it was held as follows:

"In a penal statute of this kind, it is our duty, to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for

honest unlearned (in the law) and unwary men"

In this particular, case if the word "and" is read as "or" there is no reasonable interpretation, whereas on the other hand, if the word is read as "or", the provision has meaning. Therefore this is not a case of interpreting words of ambiguous meaning such as existed in the aforesaid decision.

14. In Rosenbaum v Burgoyne, (1964) 2 All E. R. 988 at p 991 it has been stated as follows:

"It has been well settled by authority that the terms of a statute imposing penalties must be construed strictly and if the meaning of the words used is doubtful the doubt should be resolved in favour of the subject."

Sri Chennakesava Reddy relies on this decision also. In that case, two possible interpretations were put forward and the learned Judges treated one interpretation as correct by construing the terms of the statute strictly. In that case by strictly construing those terms, an intelligible interpretation resulted. In the present case, if the word "and", as it stands is strictly read with its dictionary meaning, there is absurdity, whereas on the other hand, if it is read as "or" there is meaning.

15. Sri Chennakesava Reddy has drawn my attention to some observations at pages 418 and 419 of the Principles of Statutory Interpretation by Sri G. P. Singh (1966 Edition) to the effect that the penal statute has to be strictly construed. The passage contains an extract from the decision reported in AIR 1954 SC 496 which I have already referred to above. The observations in that decision as well as in the passages of the book referred to by Sri Chennakesava Reddy apply to the case where two possible and reasonable constructions can be put upon the penal provision on the wording as it stands. They do not apply to the present case where no reasonable construction can be put upon the provision under S 2 unless the word "and" is interpreted as "or". At page 213 of the same book this matter is dealt with under the heading Conjunctive and disjunctive words "or" and "and". At page 214 it is stated as follows:

"... But if the literal reading of the words produces unintelligible or absurd result "and" may be read for "or" and "or" for "and" even though the result of so modifying the words is less favourable to the subject provided that the intention of the Legislature is otherwise quite clear".

This principle has been adopted by the learned Judge in the decision reported in AIR 1965 Ker 96. I respectfully follow the decision of the learned Judge in that

case and hold that the word "and" is to be interpreted as "or". In the result, I agree with the finding of the learned Sessions Judge that the action of the accused amounts to an offence under Section 2 (1) (i) of the Prevention of Food Adulteration Act. Contention (1) is not tenable.

16. Contention (2).— Sri Chennakesava Reddy contends that the facts of the case fall under section 2 (i) (1) and not under Section 2 (1) (i) of the Act. This is a case where a prohibited colouring matter has been used. The presence of colouring matter in the article of food is specifically covered by Section 2 (1) (i) of the Act. As the article Mysorepak contains colouring matter which was prohibited altogether, it cannot be said that it was a case where quality or purity of the article falls below the prescribed standard. I find that Section 2 (1) (i) is more appropriate provision and that the accused was rightly convicted by the lower Court of an offence under S 16 (1) read with Sections 7 and 2 (1) (i) of the Act. I reject contention (2).

17. Contention (3).— The sentence awarded by the lower Court is the minimum prescribed under the Act. The learned Sessions Judge states in the judgment as follows:

"It is stated that the accused is an old man and the sentence of imprisonment will be very heavy and even the sentence of fine would be heavy, considering his status, but unfortunately the section clearly provides for a minimum sentence of imprisonment and fine. I feel that there is no discretion left to the Court to show any lenience on any one of the grounds advanced in this case that is, his poverty and old age. I therefore confirm the conviction and sentence passed by the lower Court and the appeal is dismissed."

The learned Sessions Judge felt that it was a hard case but also felt helpless to deal with the case in the manner other than confirming the sentence imposed against him. Sri Chenna Kesava Reddy points out that in addition the accused being an old man, he is a petty shopkeeper aged over 60 years and that the offence consists of using one coal-tar dye. He points out that though Coal-tar Dyes themselves are not prohibited Rule 28 allows some specified coal-tar dyes to be used. He contends that this is a fit case for action under Section 4 (1) of the Probation of Offenders Act. He also points out that there is no evidence as to the quantity of the colouring matter that was found in the article of food. He relies on the decisions of this High Court in Cri. R. C. No 121 of 1968 and Cri. R. C. 521 of 1966 (Andh Pra) by Mirza J. in which action under Section 4 of the

Probation of Offenders Act, was taken in cases where minimum sentence of imprisonment of six months under Rule 126 (p) of the Defence of India Rules was prescribed.

18. In view of the special circumstances of the case which are referred to above, I consider that this is a fit case for action under Section 4 (1) of the Probation of Offenders Act. Accordingly, I set aside the conviction and sentence already passed against the accused and instead of awarding any sentence, straightway, direct the accused to be released under section 4 (1) of the Probation of Offenders Act on his entering into a bond for Rs 2,000/- with two sureties each for a like sum to the satisfaction of the Judicial First Class Magistrate, Madanapalle, to appear and receive sentence when called upon during a period of one year and in the meantime to keep the peace and be of good behaviour. If fine is paid, it will be refunded.

Order accordingly

1970 CRI. L. J. 1062 (Vol. 76, C. N. 265) =

AIR 1970 BOMBAY 290 (V 57 C 52)

(AT NAGPUR)

FULL BENCH

S. P. KOTVAL, C. J., B. N. DESHMUKH
AND D. B. PADHEY, JJ.

Dhirajlal Valji Kotak, Applicant v. Ramchandra Janglaji Gujar and another, Respondents.

Criminal Revn. Appln. No. 253 of 1968,
D/- 26-2-1969.

(A) Prevention of Food Adulteration Rules (1955), Rule 44-A — Ban on 'sale' of Kesari Dal — Ban is total — Word 'Sale' is not limited to sale of any article of food for human consumption only — Intention or mens rea is not an ingredient for contravention of the Rule — Cri. A. No. 1373 of 1966, D/- 15-6-1968 (Bom), Overruled, AIR 1968 Cal 342, Dissented from, AIR 1966 SC 128 & AIR 1965 Bom 17 & AIR 1965 Ker 123 (FB) & AIR 1965 Andh Pra 118 & AIR 1965 Mad 98 & AIR 1964 Pat 565 & AIR 1966 All 64, Rel. on; AIR 1965 All 231, Distinguished. (Para 46)

(B) Prevention of Food Adulteration Act (1954), Section 2 (13) — 'Sale' — Definition is not confined to sale of article of food for human consumption only — It extends to sale of any article of food regardless of the use to which it is put. (Para 46)

Cases Referred: Chronological Paras
(1968) AIR 1968 Cal 342 (V 55) =

1968 Cri LJ 912, Calcutta Corporation v. United Oil Mills 42

(1968) Cri. Appeal No 1373 of 1966,
D/- 15-6-1968 (Bom), State v.

Devilal Jain

33, 35

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- (1966) AIR 1966 SC 128 (V 53)=
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Modak, for Respondent, S M. Hajarnavis,
Addl. Govt. Pleader, for State

KOTVAL, C. J.— Two questions have
been referred for our decision as follows:

(1) Whether the definition of 'sale' con-
tained in Section 2 (xin) of the Prevention
of Food Adulteration Act, 1954, is confined
to the sale of articles of food for human
consumption or human use alone or extends
to the sale of an article of food, regardless
of the purpose for which it is sold?

(2) Whether the word 'sale' used in
Rule 44-A of the Prevention of Food Adul-
teration Rules, 1955, is used in its general
sense or in the restricted sense, meaning the
sale of Kesari dal for human consumption
only?

2. After arguments had proceeded in
the reference before us, we felt that in order
to bring out the particular points which have

been urged on behalf of the applicant ac-
cused and the State, it would be necessary
to modify the first question, and with the
consent of counsel for both the parties, we
have modified it as follows:

(1) Whether the definition of 'sale' contain-
ed in Section 2 (xiii) of the Prevention of
Food Adulteration Act, 1954, is confined to
the sale of articles of food for human con-
sumption alone or extends to the sale of an
article of food regardless of the use to which
it is put?

We have referred to the "use" because that
is the word used in the definition of sale
in Section 2 (xiii) and not purpose, though,
as we shall presently show, that makes no
substantial difference.

3. The circumstances under which the
reference arose may be briefly stated.— On
13-10-1966, a Food Inspector of the Muni-
cipal Council, Akot, visited the shop of the
applicant-accused Dhirajlal Valji Kotak. The
accused carries on business in partnership in
the name of Valji Madhavji Kotak Kirana
Shop. The Food Inspector asked for a
sample of Kesari dal or Lakh dal, purchased
750 grams of it and took action in terms of
Section 11 of the Prevention of Food Adul-
teration Act, 1954 (hereinafter referred to as
the Act). He divided the sample into three
parts and packed each part as prescribed.
When one of the packets was sent for ana-
lysis, it was found that the article purchased
by the Food Inspector was of standard qual-
ity but that the sale of that article, namely,
Kesari dal, was prohibited under the Act.
The prosecution alleged that its possession
and sale is prohibited by Rule 44-A of the
Prevention of Food Adulteration Rules, 1955
(hereinafter referred to as the Rules). The
accused therefore came to be prosecuted
under Section 7 (v) read with Section 16
(1) (a) (ii) of the Act.

4. These facts are not in dispute. The
sale has been admitted by the accused, as
also the analyst's report dated 21-11-1966.
The report in terms states that the dal as
such was of standard quality, but the sale
of that dal is prohibited under the Act.

5. Now, the defence of the accused was
a simple defence. He admitted that he had
sold the Kesari dal but it was his case that
he had neither possessed the dal nor sold it
for the purpose of human consumption. On
the contrary, he made it clear to the Food
Inspector at the time when the sample was
seized that he had kept the dal and sold it
only for the purpose of being used as cattle
fodder. In fact, in granting the receipt to
the Food Inspector for the sample quantity
purchased from him, the accused endorsed
upon the receipt itself the fact that he had
sold the sample as cattle fodder. This is
clear from the endorsement upon the receipt
Ex 8.

6. Both the Magistrate and the Addi-
tional Sessions Judge, have negatived the ac-
cused's defence. They have held that it may

be that the accused disclosed his intention at the time when he sold the sample, that he was selling it not as an item of food for human consumption but only for the purpose of being used as cattle fodder, but the rule under which the sale of Kesari dal is prohibited clearly lays down a total prohibition irrespective of what was the intention of the accused in storing or selling it. Therefore, his defence could not prevail. It is this finding which has given rise to the reference before us. When the matter came before our Brother Deshmukh in revision he felt, upon a consideration of the authorities on the question, that there has been conflicting views expressed not only between different High Courts but also in this High Court, and therefore referred the matter for decision to a Full Bench. The question is a pure question of law and depends on the interpretation of Rule 44-A and other provisions of the Act.

7. Before we state the respective contentions of the parties, it is necessary to refer to some of these provisions. The Act, as its preamble indicates, was passed in order to make provision for the prevention of adulteration of food. Section 2 (i) of the Act defines "adulterated". Section 2 (v) defines "food" and this definition is of some importance on the question referred:

"(v) 'food' means any article used as food or 'drink for human consumption' other than drugs and water and includes—

(a) any article which ordinarily enters into, or is used in the composition or preparation of human food, and

(b) any flavouring matter or condiments." (the underlining (here in ' ') is ours)

Section 2 (ix) defines "misbranded" which occurs in several sections but is not germane for our purpose. Then we come to the important definition in Section 2 (xii) of "sale":

"sale with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail for human consumption or use' or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article." (the underlining (here in ' ') is ours)

Section 2 (xiv) and (xv) define the word "sample" and the words "unwholesome" and "noxious" which occur in several sections. These definitions have to be read in the light of the opening clause of Section 2 ".... unless the context otherwise requires".

8. Next we turn to the section which creates the offence with which the accused was charged in the present case and the section which punishes that offence. They are Sections 7 and 16:

7. 'No person shall' himself or by any person on his behalf 'manufacture for sale,

or store' sell or distribute—

(i) any adulterated food.

(ii) any misbranded food;

(iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health; or

(v) 'any article of food in contravention of any other provision of this Act or of any rule made thereunder.'

Section 16, so far as is relevant, is as follows:

"16. (1) If 'any person—

(a) Whether by himself or by any other person on his behalf imports into India or manufactures for sale or stores, sells or distributes any article or food'—

(i) which is adulterated or misbranded or the sale of which is prohibited by the Food (Health) authority in the interest of public health;

(ii) other than an article of food referred to in sub-clause (i), in contravention of any of the provisions of this Act or of any rule made thereunder, or

* * *

(again the underlining (here in ' ') is ours)

It is under sub-clause (ii) of Section 16 (1)

(a) read with Section 7 (v) that the accused has been convicted. Both these sections it will be noticed, refer generally to "food" or "any article of food" but do not refer to any particular class of food or article of food. Kesari dal is however expressly provided for in Rule 44-A which is made only with reference to Kesari dal. Rule 44-A was inserted comparatively recently by the Union Health Ministry's notification No. F 14-41/59-PH. Pt I. dated 2nd February, 1961. It provides.

"44-A. No person in any State shall, with effect from such date as the State Government concerned may by notification in the Official Gazette specify in this behalf, sell or offer or expose for sale, or have in his possession for the purpose of sale, under any description or for use as an ingredient in the preparation of any article of food intended for sale—

(a) Kesari gram (Lathyrus Sativus) and its products,

(b) Kesari dal (Lathyrus Salivus) and its products

(c) Kesari dal flour (Lathyrus Sativus) and its products,

(d) a mixture of Kesari gram (Lathyrus Sativus) and Bengal-gram (Cicer Arietinum) or any other gram,

(e) a mixture of Kesari dal (Lathyrus Sativus) and Bengal gram dal (Cicer Arietinum) or any other dal,

(f) a mixture of Kesari dal (Lathyrus Sativus) flour and Bengal gram (Cicer Arietinum) flour or any other flour.

Explanation — The equivalents of Kesari gram in some of the Indian languages are as follows:

- Hindi — Kesari or Khisari
Sanskrit — Triputi
Bengali, Malyalam, Tamil and Oriya — Khesari
Telgu — Lamka
Gujarati and Marathi — Lakh ”

Rule 44-A was brought into force in the State of Maharashtra by the State Government notification No. PFA 1060/D dated 15th November, 1961, published in the Gazette dated 23rd November, 1961. The notification brings the rule into force from the 20th day of November, 1961.

9. Now, the principal contention on behalf of the accused has been that looking to any of the provisions to which we have referred above, the prohibition to manufacture for sale, store, sell or distribute contained in Section 7 read with Section 16 (1) (a) (i), as also in Rule 44-A, is only in respect of an article of food meant for human consumption or use, and nothing more. Therefore, if a person either expressly so declaring it or proving by other evidence, sells the prohibited article — in this case Kesari dal — for a purpose other than human consumption or use, he would not come within the mischief of the Act and the Act does not intend to prevent such sales. The other contention is that this is a penal law and would be governed by the normal principle that the Court should always have recourse to the mens rea or intention of the accused before convicting him of an offence and that having regard to the provisions to which we have referred, there was no intention on the part of the accused to sell this dal to anyone including the Food Inspector for human consumption or use, and therefore the accused cannot be convicted. It was urged that though R 44-A expressly refers to Kesari dal and prohibits its sale or exposure for sale or even the possession for the purpose of sale still Rule 44-A must be read in the light of the provisions of the parent Act under which it is framed, and therefore, it must be held that it was not intended by Rule 44-A to prohibit the

sale of Kesari dal for purposes other than human consumption or use.

10. The argument is sought to be developed principally upon the definition of the word “sale” in Section 2 (xiii). Section 7 (v) prohibits the sale of any article of food in contravention of any rule made under the Act. Therefore, Section 7 itself has regard to the definition of “sale” in Section 2 (xiii) and the definition of “food” in Section 2 (v). Both these definitions, it was contended refer only to “human consumption”. Similarly, it is contended that Section 16 (1) (a) (i) in prescribing the penalty refers to the sale of an article other than an adulterated or misbranded article or the sale of which is prohibited by the Food (Health) authority in the interest of public health, in contravention of any of the provisions of this Act or of any rule made thereunder. Here again, therefore, the section has regard to the definition of “sale” and to the definition of “food”, by the use of the words “article of food”. Rule 44-A similarly uses the words “sell or offer or expose for sale, or have in his possession for the purpose of sale”. Therefore, one must turn to the definition of “sale” in order to construe these provisions of the law and sale means sale for human consumption only. Now, we have already quoted the definition of sale and an analysis of that definition shows that it is in two parts, each part respectively preceded by the words “means” and “includes”. The former is truly a definition and the second is only an artificial definition by way of inclusion. We are really not concerned with the second part i.e., the inclusive definition though it has a bearing upon the interpretation of the first part. The real definition preceded by the word “means” refers to “sale”. What is being defined, therefore, is not the sale of any article of food but “sale” by itself. In defining “sale” the draftsman has used three different concepts which may, for the purposes of clarifying what we wish to state, be described as “the subject of the sale”, “the manner of the sale” and “the purpose of the sale” or “the use of the article” and these are indicated in the definition by the words which we quote against each head:

- | | |
|---|---|
| 1. The subject of the sale. | “any article of food”, |
| 2. The manner of the sale; | (a) “whether for cash or on credit”, or |
| | (b) “by way of exchange” |
| 3. The purpose of the sale, or use of the sale: | (a) “whether by wholesale or retail”, |
| | (b) “for human consumption” or |
| | (c) “use”, or |
| | (d) “for analysis” |

11. The definition is no doubt a tautologous definition in so far as it defines “sale” to mean “the sale of any article of food”. But when we come to consider the several ingredients which we have analysed above, it would be found that the draftsman intended to exhaust every category of sale and to include in it every ingredient normally required in a sale. Thus, in the first category,

namely, the subject of the sale, he has used the words “any article of food” without exception. Therefore, the definition includes any and every article of food. We shall presently refer to the definition of food. In prescribing the manner of sale, the draftsman has also enumerated every mode in which a sale is possible by referring the three categories (i) whether for cash, or (ii) on cre-

dit, or (iii) by way of exchange. We cannot conceive of a sale which is not included in one of these three categories. Lastly, in dealing with the purpose of the sale or the use of the article, the draftsman has used four expressions (i) by wholesale or retail, that is to say, to a dealer dealing in any article for food, (ii) for human consumption, that is to say, to a consumer, (iii) for other uses (we will presently advert to this category), and lastly (iv) for analysis.

12. The last category, namely, the sale of any article of food for analysis takes us to the provisions of Sections 10 and 11 of the Act. Section 10 (1) (a) gives power to a Food Inspector appointed under the Act to take samples of any article of food from (i) any person selling such article, (ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee, and (iii) a consignee after delivery of any such article to him. He is also given the power to send such a sample for analysis to a public analyst and other powers. Section 11 prescribes the procedure to be followed by the Food Inspector in taking samples. The reference therefore in the definition in Section 2 (viii) to the sale of any article of food "for analysis" has reference to these provisions of the law.

13. With this analysis we proceed to examine the contention of the applicant-accused. It is urged that the words "for human consumption" are paramount in the definition and so to say, create a condition precedent to the existence or establishment of sale. So read, counsel urged, the definition says that "sale" means the sale of any article of food for human consumption, and since "for human consumption" is a qualification or a condition precedent to there being a sale, it must necessarily follow that wherever the word "sale" is used in the substantive provisions, it means only the sale for human consumption.

14. We have shown above that the words "for human consumption or use" are only two categories of the purpose of a sale, the other two being the sale to a wholesale dealer or a retail dealer, and the sale for the purposes of analysis. So viewed, the words "for human consumption" do not assume the importance which counsel endows them with, nor do we think that the words "for human consumption" govern the words "any article of food" but govern the words "the sale of any article of food". It must be borne in mind that what is being defined is "sale" and not "any article of food."

15. The definition itself moreover gives an indication that sale is not exclusively confined to the sale of articles of food for human consumption and that sales for other purposes would also come within the ambit of the definition. For instance, definition also includes a sale for analysis where a Food Inspector takes a sample under his

powers under Sections 10 and 11. It is now settled law that a sale for the purposes of obtaining a sample to a Food Inspector under the provisions of Sections 10 and 11 of the Act is also a sale within the meaning of the definition.

16. In *Mangaldas v. Maharashtra State* AIR 1966 SC 128, an appeal from this Court, it was argued before the Supreme Court that a sale for sample is not a sale which partakes of the usual nature of sale, namely, that it is a contract voluntarily entered into, and that therefore it cannot be held to be a sale within the meaning of the Act. The Supreme Court referred to several Madras decisions under the Madras Prevention of Food Adulteration Act, where it was held that transactions by which a sample of article of food was obtained by a Sanitary Inspector from the vendor amounted to a sale even though the vendor was bound to give the sample tender of the price thereof and then proceeded to repel the contention by observing

"But Mr. Anthony contends that a contract must be consensual and that this implies that both the parties to it must act voluntarily. No doubt a contract comes into existence by the acceptance of a proposal made by one person to another by that other person. That other person is not bound to accept the proposal but it may not necessarily follow that where that other person had no choice but to accept the proposal the transaction would never amount to a contract. Apart from this we need not, however, consider this argument because throughout the case was argued on the footing that the transaction was a 'sale'. That was evidently because here we have a special definition of 'sale' in Section 2 (viii) of the Act which specifically includes within its ambit a sale for analysis."

Thus, the definition itself calls that a sale which may not in normal circumstances always amount to a sale, namely, sale for analysis. Now a sale for analysis, it is clear, is never a sale of that article of food for human consumption. Therefore, it shows that the entire definition is not concerned with only the sale of an article of food for human consumption.

17. We may also say that the Prevention of Food Adulteration Act does not merely deal with the sale of an article of food but with other modes of dealing with an article of food, such as for instance, those mentioned in Section 7, namely, the manufacture for sale or storage or distribution of food or an article of food. In the case of manufacture for sale also the word "sale" occurs but it would be impossible to hold that the reference to "manufacture for sale" has reference only to manufacture of an article for human consumption. That would make the provisions of the Act practically nugatory, and impossible to implement for no one except the manufacturer would

know what he is actually manufacturing the article for. If "manufacture for sale" means manufacture of any article of food for human consumption, then it would be impossible to implement the Act, the manufacturer could always say that he had manufactured the article for some purpose other than human consumption.

18. Some support for the contention on behalf of the accused was sought to be derived from the definition of food in S. 2 (v). No doubt that definition enters into any construction of the word "sale" because sale is defined with reference to any article of food. Therefore, it is necessary to see the definition of food. The contention is that this definition also uses the words "any article used as food or drink for human consumption". Therefore, it is urged that the emphasis is firstly on the user, and secondly on the user for human consumption, and since it is an ingredient of the definition of "sale", it is an additional reason for holding that the word "sale" is only confined to sale of any article of food for human consumption.

19. In our opinion, upon the correct analysis of the definition of "sale" in Section 2 (xiii) which we have already made above nothing turns upon the definition of "food" in Section 2 (v). We have already shown that the words "for human consumption" in the context in which they are used in the definition of "sale" are used to describe only one of four purposes for which a sale may take place, the first category being to a dealer by wholesale or retail, the second being to a consumer (by the use of the words for human consumption); the third being for other use, and the fourth being for analysis. It is in this context that the words "for human consumption" have to be read. The effect of these two definitions read together would therefore be as follows: The Court must see first of all whether it is established that there was a sale of any article of food. In determining that the Court has to be satisfied that it is an article used as food or drink for human consumption. But once the sale of any article of food is established the purpose for which it is sold, need not necessarily be only for human consumption or use. It may be any one or more of the purposes mentioned in the definition of sale viz to a dealer or for use other than human consumption or for analysis. Thus, even taking into account the definition of "food" in Section 2 (v), we do not think that we can accept the contention that the definition of sale is limited to sale of an article of food only for human consumption.

20. Then we turn to examine whether Rule 44-A makes any difference. Rule 44-A no doubt uses the words "sell or offer or expose for sale, or have in his possession for the purpose of sale". In each of these expressions the definition of "sale" would no

doubt enter, but we have already shown that that definition does not imply that it has reference to the sale of any article of food only for human consumption. It was pointed out on behalf of the applicant that Rule 44-A does not impose an absolute bar on all dealings with Kesari dal, but having regard to the words thereof and reading it in the light of the provisions of the opening part of Section 7, the following modes of dealing with Kesari dal are not prohibited by Rule 44-A:

- (i) manufacture for sale,
- (ii) storage,
- (iii) distribution without consideration, i.e. free distribution of Kesari dal. If it is for consideration, of course it will amount to sale, and
- (iv) personal consumption of the person who has grown it.

It was therefore urged that the ban on the dealing with Kesari dal is not a total ban especially when in each one of these modes of dealing described in Rule 44-A only a reference to the definition of "sale" has been made.

We do not think that simply because some modes of dealing with Kesari dal may be permissible under the Rules, we can give the expression "sell or offer or expose for sale or have in his possession for the purpose of sale" any different meaning or connotation than that which we are bound to give under the definition of "sale" in Section 2 (xiii). When an Act defines a word, and that word is used in a rule framed under powers conferred by that Act, then that word just carries the same meaning which is assigned to it in the definition — unless the subject or context necessarily implies otherwise. There is nothing in the subject or context of Rule 44-A to suggest that any different meaning was intended, even assuming that Rule 44-A leaves some modes of dealing with Kesari dal to a person.

21. Lastly, some emphasis was put by the counsel on the preposition "for" preceding the words "human consumption" in the definition of "sale". The counsel contrasted it with the prepositions used in other clauses, for instance "whether by wholesale or retail" in contrast to "for human consumption". We do not think that anything turns upon this distinction because the preposition "for", though it no doubt indicates "for the purpose of", is not used in contradistinction with the preposition "by" in the earlier clause but because the requirements of simple grammar necessitate the use of that preposition. In the earlier clause viz "whether for cash or on credit or by way of exchange", similarly three different prepositions are used "for", "on" and "by", also because simple grammar requires it. No greater meaning therefore can be attached to the different prepositions used preceding the different clauses.

22. Another contention was founded upon the use of the word "use" after the

words "for human consumption or". The counsel sought to derive the meaning of the word "use" in the expression "for human consumption or use" by saying that it is one composite expression and "use" is also human use. He further pointed to the comma after the word "use" to suggest that the expression "for human consumption or use" is one composite expression because it has a comma preceding and a comma succeeding. Thus construed, counsel argues that even though "use" is separately mentioned, it is ejusdem generis with "human consumption" and therefore the word "use" must necessarily be limited to use for human beings.

23. We are quite unable to accept this contention for, if the word "use" were intended to imply use of human beings, then we cannot understand why the preceding phrase "for human consumption" should have been used at all because consumption is also use and it would merely amount to tautology to say human consumption or use. It is clear to us that "human consumption" and "use" are two distinct and separate categories and the word "human" does not control the word "use". On the other hand, what was intended to be implied was the sale of any article for human consumption or the sale of any article for any use whatsoever, including use by human beings for any purpose whatever. In the context of prevention of food adulteration, use can of course only be by human beings, but it does not necessarily follow that the use must be limited to use for consumption of human beings. In our opinion, the word "use" implies any use to which an article of food can be put to.

24. In the light of what we have said, it is clear that in the case of a prosecution under Section 7 read with Section 16, what the prosecution has first to establish is that the article dealt with is an article of food. Once that is established, the next question to ask is whether a sale has taken place or the person has dealt with the article in any one or more of the prohibited modes mentioned in Section 7. The Act is not confined only to the sale, storage or distribution of food to be used only for human consumption.

25. We next turn to the other part of the same argument, namely, that having regard to the definitions and the provisions of Sections 7 and 16, the Court must take into account the intention or the mens rea of the accused. So far as the Act itself is concerned, particularly the definition of "sale" or the definition of "food", we cannot see where there is any scope for reading into that definition the requirement that the intention of the accused in selling an article of food has to be taken into account. "Sale" means the sale of any article of food in the several ways prescribed and for the several purposes mentioned. The Act does

not define "sale" with reference to the State of mind of the person selling. The inclusive definition moreover makes it clear that certain acts which would not normally be sales amount to sale, as for instance, the exposing for sale or having in possession for sale. With what intention such a sale takes place is no part of the definition, nor does this requirement appear upon a plain reading of Section 7 or Section 16, which merely use the word "sale". In Section 7 moreover the word "store" is used and we do not suppose that the intention with which an article is stored could ever be ascertained by the enforcing authority. In such a case if the theory of intention were to be read into the Act, the provision will become impossible to implement. If the theory of intention cannot be applied to the act of storing, we can see no reason why it should only be applied to selling. Therefore, reading into the provision any intention or mens rea on the part of the accused as an ingredient would render the salutary provisions of the section almost impossible of implementation.

26. But we need not go further into this question because under this very Act, the pronouncement of the Supreme Court in AIR 1966 SC 128 to which we have already referred, puts an end to this contention. In that case, one Mangaldas, a wholesale dealer, had sold turmeric powder, admittedly used for human consumption, to one Daryanomal. The turmeric powder was found to be adulterated and both Mangaldas and Daryanomal were prosecuted. While Mangaldas admitted that he had sold and despatched a bag containing turmeric powder he contended that what was sent was not turmeric powder used for human consumption but as "Bhandara" i. e. for use for religious purposes or for applying to the forehead. This contention, it may be noted, is similar to the contention raised in the present case, that the lakh dal was sold as cattle fodder. The contention was rejected unanimously by all the Courts, and in the appeal before the Supreme Court, counsel for Mangaldas urged that it was necessary to establish that the appellant had the mens rea to commit the offence. The Supreme Court referred to its own earlier decision in Hariprasada Rao v The State, AIR 1951 SC 204 and held:

"What was held in that case is that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of the crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind. The proposition there stated is well established. Mere Section 19 (1) of the Act clearly deprives the vendor of the defence of merely alleging that he was ignorant of the nature, substance or quality of the article of food sold by him and thus places upon him the burden of showing that

he had no mens rea to commit an offence under Section 7 (1) or 16 (1) (a) of the Act." The Supreme Court also referred to another decision of its own in the State of Maharashtra v. Mayer Hans Georg, AIR 1965 SC 722 under the Foreign Exchange Regulation Act, 1947, and held that they were unable to accept the contention of counsel that it was necessary to establish that the appellant had mens rea to commit an offence.

27. We may by way of explanation merely mention here that the words "and this places upon him the burden of showing that he had no mens rea to commit an offence under Section 7 (i) or 16 (1) (a) of the Act" were words used with reference to the exceptions mentioned in Section 19 (2) and not to imply that there is any exception to the general principle that mens rea would not enter into the consideration of any offence under the Act. The decision in Mangaldas's case therefore negatives any contention that the mens rea or intention of the accused has to be taken into account in considering offences under Section 7 read with Section 16 of the Act.

28. The other authorities which were referred to also show that in a majority of cases, the same view has been taken. So far as the Bombay High Court is concerned, the reported decision is to be found in State v. Shankar Gambhire, AIR 1965 Bom 17 where a Division Bench held that in a prosecution under Section 16 (1) (a) all that the prosecution need prove is (a) that a sale has taken place and (b) that the same is a sale of an article of food. The Division Bench further held that the question of the intention of the seller is entirely irrelevant for the purpose of contravention of Section 7 (i) of the Act and that it is sufficient if the object or the article sold happens to be an article of food and the article is found to be adulterated. With respect, we consider that that case was correctly decided.

29. In Shankar Gambhire's case, AIR 1965 Bom 17 itself, the Division Bench referred to a number of unreported decisions of this Court in para 10 of their judgment. Those decisions have all taken the same view. Of course, the first mentioned of these decisions is State v. Binraj Punamchand Marwadi, Cr. Appeal No 586 of 1960 D/- 16-11-1960 (Bom). What fell to be considered was the Act earlier to the present one, namely, the Bombay Prevention of Food Adulteration Act, 1925 but the principle of that decision would apply here.

30. In all these cases, the article involved was cocoanut oil. In Binraj Punamchand's case, Cr. Appeal No 586 of 1960, D/- 16-11-1960 (Bom) a plea was also taken that in Nasik from where that case arose, cocoanut oil was not ordinarily used as an article of food. Dixit, J. answered the point by observing:

"it is, to my mind, clear that what 'food'

as contemplated by Section 2 (a) means is any article which ordinarily is used in the composition or preparation of human food, and it seems to me that it is not possible to accept the contention on behalf of the accused that cocoanut oil is not ordinarily used as an article of food."

Then the learned Judge went on to answer point of mens rea by saying:

"In this case there is no question of mens rea because the enactment is made in the interest of public health....."

Though this was a decision under the earlier Act, it was a statute in *pari materia* and would apply in the construction of the present Act.

31. The next decision was that of a learned single Judge in State v. Vasant Shivram, Criminal Appeal No. 1807 of 1962, D/- 3-5-1963 (Bom). There also a plea was taken that cocoanut oil was not used in that part of the country from where the case arose as food or in the preparation of food. That plea was negatived, the learned Judge observing:

"All that is necessary for the prosecution to show is that the accused sold an article of food as defined by the Act and the Rules framed thereunder. Whether in a particular case, a particular article was sold or purchased for the express purpose of using it as food is entirely irrelevant"

32. The third case was State v. Uttamchand Hasarimal (Cr. Appeal No. 230 of 1963 D/- 26-7-1963 (Bom)). This was also a case of sale of coconut oil. It was found adulterated to the extent of 94.2% with mineral oil. In that case, the Magistrate had found that the accused had not stocked the article for sale as an article of food, and on that footing he had acquitted the accused a ground very similar to the one raised in the present case. Once again, a contention was raised that the sale was not really a sale for human consumption but the oil was to be used for oiling the boiler of the accused in his oil mill, and that in any event, cocoanut oil was not used as an article of food at Malegaon where the offence took place. The learned Judge held:

"Moreover, there is really no justification for holding that cocoanut oil ceases to be 'food' in an area where it is not generally used. Such an argument will lead to very absurd results. Knowing the food habits of the people in this part of the country, though it is quite possible to say, that one variety of edible oil is used more generally than some other edible oil, it is not as if the less used edible oil ceases to be an edible oil, though it is sold in the market."

The learned Judge further held that the bar under section 7 (i) is against selling food which is adulterated; cocoanut oil is an edible oil and therefore an article of food. Being adulterated, the accused was liable for an offence under Section 7 (i). All these decisions were, with respect, correct, in our

opinion, so far as the point before us is concerned. Thus, so far as this Court is concerned, it may be said that the view taken has been a consistent view except for one decision upon which counsel for the applicant strongly relied. That decision has in fact necessitated the present reference.

33. That decision is the one in *State v. Devlal Jan*, Criminal Appeal No. 1373 of 1966, D/- 15-6-1968 (Bom) by a Division Bench of this Court. That was a case which concerned the very commodity with which we are concerned, namely, kesari dal. A sample was taken as in the present case from the accused and he was prosecuted under Section 16 (1) (a) (i) read with Section 7 (iv) and Rule 44-A (b). It may be noticed that in that case the prosecution is stated to be under Section 16 (1) (a) (i) read with Section 7 (iv) and Rule 44-A (b). We are quite unable to see how for contravention of Rule 44-A, the prosecution can be under Section 16 (1) (a) (i) read with Section 7 (iv). Section 7 (iv) refers to an article of food, the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health. In the whole of the judgment, there does not appear to be any reference to the prohibition by the Food (Health) Authority. It seems to us very clear that the prosecution was under Section 16 (1) (a) (ii) read with Section 7 (v). However, that difficulty does not affect the principle laid down in that case.

34. In that case it was contended on behalf of the accused that there was no evidence whatever on the record to show that the accused had sold Kesari dal as an article of food. On the other hand he had produced evidence that Kesari dal was sold by him as an article of cattle fodder. The Division Bench observed that the Prevention of Food Adulteration Act was concerned with the prevention of Adulteration of food and that Rule 44-A was made by the Central Government under its power under Section 23 (f). Reading Section 7 (iv) (it should be section 7 (v)) with Rule 44-A (b), the Division Bench held that only the sale of Kesari dal as an article of food is prohibited and a sale in defiance of this provision is made penal under Section 16 (1). They therefore held that in order to sustain a conviction for contravention of section 7 (iv) (7 (v)) read with Rule 44-A (b), it is necessary for the prosecution to show that Kesari dal was being sold by the accused as an article of food. The Division Bench further observed:

"It is pointed out by the learned Assistant Government Pleader that the definition of 'sale' includes sale for analysis also. That undoubtedly is so, but the sale for analysis to come within the definition of sale under the Act must be the sale of an article of Food."

Then they proceeded to examine the evidence and found that there was no evidence produced to show that when the sample was purchased by the Food Inspector, it was offered for sale by the accused as an article of food or that he had sold the sample as a sample of an article of food. They therefore held that the accused had not committed an offence and ordered his acquittal.

35. Now, it seems to us that in this decision very little assistance was given to the Court in coming to a correct decision. The learned Assistant Government Pleader who argued the case on behalf of the State does not appear to have referred either to the relevant provisions of law or to any of the previous authorities — and they were several of them as we have shown. We have already referred to the decision in *State v. Shankar Gambhire*, AIR 1965 Bom 17 and to the several previous decisions of this Court referred to in the penultimate paragraph of that judgment. If these decisions had been cited they would ordinarily have been binding upon the Division Bench which decided Criminal Appeal No. 1373 of 1966 (Bom). If there is one thing remarkable about that decision, it is that none of these cases were referred to by the counsel for the State and therefore did not come to be referred to by the Division Bench. Moreover, we find that counsel for the State virtually conceded in that case, that upon the evidence it had not been established that Kesari dal was an article of food, a concession which was pusillanimously made for, a perusal of the decision of the learned single Judge in this case which referred the matter to the Full Bench alone will show that there was ample material for holding that Kesari dal is an article of food. In the penultimate paragraph of that judgment, the Division Bench has stated:

"It is not disputed that the sale of Kesari dal is not absolutely prohibited and there is no prohibition against its sale as cattle fodder. The prohibition is only against the sale of the article as an article of food for human consumption."

This again was a concession which was wrong in law. It is the very point which has been pressed before us viz. that the prohibition is absolute. We do not think it necessary to enter into greater detail as to the reasons in that case. The whole basis was incorrect because an incorrect concession was made and because of the failure of counsel on behalf of the State to refer to the relevant provisions of law and to the reasoning in the previous decisions of which there were at least five of this Court alone. That case, it must be held, was incorrectly decided.

36. So far we have referred only to the authorities of this Court but there is a considerable volume of authority of other Courts also where the same views have been ex-

pressed. We will refer to some of them which directly bear upon the question referred to us.

37. A Full Bench of the Kerala High Court in *Govinda Pillai v. Padmanabha Pillai*, AIR 1965 Ker 123 (FB) held that Kesari dal was an article of food within the meaning of the Act. It held upon a reference to books on medical jurisprudence that Kesari dal was being used as food, and took judicial notice of that fact. The Full Bench also held:

"It is enough if the article in general is used as food for human consumption, or is used in the preparation of human food, and every particular stock of that article becomes food, no matter that it is intended for some other use. A particular stock of rice or milk, for example, does not cease to be food because it is intended not for human consumption but for feeding animals; and so long as Kesari dal in general is an article used as food for human consumption or is ordinarily used in the preparation of human food, the particular stocks which the accused persons were holding would be food as defined by the Act, no matter that the particular stocks were intended for sale as fodder."

With the greatest respect we are in complete agreement with this statement of the law. That case moreover was almost identical with the case before us including the defence taken by the accused.

38. The other case which is relevant is *Public Prosecutor v. Nagbhushanam*, AIR 1965 Andh Pra 118 which overruled an earlier decision of a single Bench of that Court. In para. 16 the Division Bench held.

"As regards the first ground, there is nothing in the Act which posits that an article of food may be adulterated with impunity provided it is not used as food throughout the length and breadth of the country. On the contrary there is every indication in the Act that it seeks to protect the public by preventing adulteration of any article or substance which is used as food in any part of the country. It is immaterial whether a given article or substance is not used at all as food in a particular region, or is used only by a section of the people in a given region."

With respect, we accept this statement of the law.

39. In *Public Prosecutor v. Palanisami*, AIR 1965 Mad 98 a learned single Judge was concerned with the case of adulterated asafoetida. It was found to contain coal-tar dye which should make it an adulterated article of food and also perhaps unwholesome for human consumption. The plea of the accused was that the asafoetida was being sold by him only for feeding cows and goats and therefore, by implication that it was not sold for human consumption. We are with respect in agreement with the answer which the learned

Judge gave to such a plea. On page 98 he observed:

"What the accused contended and which contention has found acceptance at the hands of the learned Sessions Judge is that it would not be an offence under the Act, if an article intended for human consumption is sold to a customer on the express understanding that it should be given to cattle and not consumed by human beings. The crux of the offence does not lie in the use to which the buyer may put an article, but whether intrinsically the article sold or exposed for sale is one used for human consumption or not. The plea of the accused seems to be that, because he used to represent to his buyers that this particular asafoetida which he had in stock, should be used only for feeding cattle and not used as human food, he would be exempt from prosecution.

"It would be as if a vendor of adulterated milk could aver that he sold adulterated milk to a customer on the distinct understanding that the customer should not give it to his baby but should give it only to his cat, and therefore, urge that he had not sold adulterated milk and had not committed any offence."

The crux of the offence does not lie in any possible understanding between the seller and the buyer as to the use to which the article sold is to be put, but whether the article intrinsically is an article of food, or, as defined in section 2 (v) (a), an article which ordinarily enters into, or is used in the composition or preparation of human food."

40. A similar view was taken in *Patna Municipal Corporation v. Dulaichand*, AIR 1964 Patna 565 where the adulterated article was turmeric and the defence was that there was no evidence to show that what the accused had sold to the Food Inspector was intended to be used as food and that it was possible that the turmeric may have been sold for use as dye. The learned Judge referred to the decision of the Andhra Pradesh High Court in the case of *Public Prosecutor, Andhra Pradesh v. S. Satyanarayana*, AIR 1958 Andh Pra 681 (which has subsequently been overruled). The learned Judge declined to follow it and observed.

"But in view of the definition of 'food' which is to be found in Section 2 (v) of the Act, the Court is not concerned with the actual use to which the article in question may be put. To constitute 'food' for the purpose of the Act, it is enough that the article in question is usable as food or drink for human consumption. The word 'used' which is to be found in Section 2 (v) of the Act obviously means usable or capable of being used, and not to be used or for the purpose of being used."

That is a construction of the definition of 'food' which we have already said is acceptable to us. With respect, we accept

the above statement of the law in the Patna case.

41. A view contrary to the view which has commended itself to us was taken in *Nagar Mahapalika Varanasi v. Panna Lal*, AIR 1965 All 231 by a learned single Judge. In that case, however, the learned Judge came to a positive finding that Kesari dal was not ordinarily used for human consumption and hence it was not included within the definition of "food" in Section 2 (v). That of course was a finding of fact in that case and serves to distinguish it from the present case. In the present case, as we have said, the learned single Judge referred this matter to the Full Bench as, in his opinion, Kesari dal was an article of food. We have also shown that Kesari dal or lakh dal is an article of food. The same learned Judge has, in another case decided by him later, *Varanasi Municipality v. Sudhieswan Devi*, AIR 1966 All 64, taken, with respect, the correct view in the case of adulterated ghee. After quoting the definition of "sale" in the Act, the learned Judge observed as follows:

"The aforesaid definition is of wide amplitude and embraces not only a sale for human consumption or use but also a sale for analysis. It is, therefore, manifest that the sale of a sample of ghee to the Food Inspector was a sale under the provisions of the Act. A dealer cannot, therefore, escape the clutches of law by merely describing an article of food at the time of its sale as 'Akhadya'".

42. On behalf of the applicant, strong reliance was placed on the decision of the Calcutta High Court in *Calcutta Corporation v. United Oil Mills*, AIR 1968 Cal 342. In that case, the Oil Mill and the proprietor were prosecuted for having in their possession Jingly Oil, otherwise known as Til or Sesame Oil, containing linseed oil. The Jingly Oil was found adulterated in that it was mixed with linseed oil. One of the defences was that though it was an article of food, it was stored for the purposes of the Mills, namely for industrial purposes. The learned Judge noticed the decision of this Court in AIR 1965 Bom 17, but he preferred to accept the view of his own High Court in Criminal Appeal No 297 of 1961 D/- 27-6-1963 (Cal) *Corpn of Calcutta v. Ghasiram Agarwalla*. Though the latter case has been referred to in para 8 of the judgment, we are unable to gather from the report of the *United Oil Mills Case*, AIR 1968 Cal 342, what was the reasoning which impelled the decision in *Ghasiram's case*. The principle was however stated by the learned Judge in Col. 1 of page 315 as follows:

"As stated above, according to the *Ghasiram's case*, it is always open to the defence to plead and to prove that the sale or the storage was of an article of food which was never meant for human consumption or use. I proceed to consider the facts of

this case on the basis of the view expressed in *Ghasiram's case*, Cr. Appeal No. 297 of 1961, D/- 27-6-1963 (Cal)."

43. Now, we have already said that upon the analysis of the provisions of the Act, particularly sections 7 and 16, read in the light of the definitions of "food" and "sale", there is no scope in those provisions for letting in the intention of the person dealing with the article of food or for consideration of his 'mens rea'. We have indicated that this is also the law as declared by the Supreme Court. The expression "food" which was never 'meant' for human consumption or use (underlining (here in ' ') is ours) was used in the above passage, suggesting that the intention or mens rea is to be taken into account. The learned Judge thus took into consideration the intention of the accused who was in possession of Jingly Oil in this case, and therefore it seems to us that the judgment in that case is not in consonance with the decision of the Supreme Court, nor, upon the reasons we have given, based upon a correct interpretation of the provisions of law. The actual decision in that case, however, holding the first accused (the partner of the Mills) guilty was, with respect correct. We may also say that that case was decided on the mere application of Rule 44 which deals with cases where two articles, both articles of food, are mixed up and the case of Jingly Oil mixed with linseed oil is specifically dealt with in R. 44. Both Jingly Oil and linseed oil were edible oils as would appear from entries Nos A-1704 and A. 17.11 of Appendix B to the Rules.

44. The Calcutta case also was decided upon another point, a point which was also adverted to in the arguments before us on behalf of the petitioner, namely, that hardship would be caused by the interpretation that we propose to put upon the definitions of "sale" and "food". It was urged that if we were to hold that simply because an article is ordinarily used as "food", it would attract the mischief of the Act if found adulterated, irrespective of whether it was meant for human consumption or not, it would work great hardship upon industrial establishments and others who use such articles for industrial purposes. In the Calcutta case this argument appealed to the learned Judge, for he observed in para 8.

"The acceptance of this argument would lead to the starvation of many industrial establishments or force them to manufacture raw materials."

That was one of the reasons why he held that "the Prevention of Food Adulteration Act deals with food and it will be open to the accused to plead that the article involved in any case is not food".

45. Where the provisions of law are clear and the intention of the legislature can be clearly gathered from them there is no scope for any considerations of hardship.

It must be presumed that the legislature was alive to the possible hardship it may inflict on some citizens who use Lakh dal as cattle fodder and yet decided to impose a total ban on its sale. Lakh dal has been proved to be seriously deleterious to human health if consumed by human beings and the legislature may well have thought that no relaxation whatever in the matter of its sale should be permitted even though it could be used as cattle fodder, for the starving and the hungry would always be tempted to consume it so long as it was available. The object of the Act is the prevention of adulteration of food and thereby to safeguard the health of the community. The Legislature in its wisdom considered that object paramount as opposed to the hardship upon a few citizens using an article of food for purposes other than human consumption or as in some of the cases we have referred to in an adulterated state for industrial purpose. We may also say that the hardship is not so great as is sought to be made out, for the industrial uses of an article of food must necessarily be after considerable adulteration and a stage would be reached where that article of food would cease to be an article of food. For instance, in the case of turmeric mixed with lead, a point may be reached by the increasing admixture of lead when it ceases to be turmeric and becomes only lead. At that stage, it would be a question of fact as to what is the real article. Is it an article of food or is it an article industrially used not connected with food? It seems to us on a perusal of the totality of the provisions of the Act that the Legislature, in order to protect the health of the community by preventing the adulteration of food, deliberately bypassed the possible hardship in a few border-line cases. We do not think therefore that this argument of hardship can prevail against the clear provisions of law.

46. Thus, upon a consideration of the authorities and the provisions of law, in our opinion, the following conclusions would flow:

(1) That what is necessary to establish in the case of a sale under the Prevention of Food Adulteration Act is—

- (a) that there is an article of food,
 - (b) that a sale of that article has taken place and
 - (c) that the article is either adulterated, misbranded or dealt with contrary to a prohibition or a rule under the Act, or its sale is otherwise prohibited as in Rule 44-A:
- It follows from this that if an article is proved to be an article of food it must be sold or otherwise dealt with only in its pure form.

(2) That the ban on the sale of Kesari dal in Rule 44-A is total and there is no scope for any exception or exemption;

(3) That it is no defence to a prosecution under the Act to say—

1970 Cri.L.J. 68,

(a) that the accused did not intend to use Kesari dal as food, or

(b) that he never intended to sell it as food.

Intention or mens rea as such is totally irrelevant to the applicability of Rule 44-A and so is the question of the use to which an article is put:

Upon this view, we would answer the two questions referred as follows:

1. The definition of "sale" contained in section 2 (xiii) of the Prevention of Food Adulteration Act is not confined to the sale of articles of food for human consumption only but extends to the sale of any article of food regardless of the use to which it is put.

2. So far as the second question is concerned, upon the view which we have taken on the first question, it does not really survive for consideration.

47. The papers may now be returned to Mr. Justice Deshmukh for disposal of the criminal revision application.

Reference answered accordingly,

1970 CRI. L. J. 1073 (Vol. 76, C. N. 266) =
AIR 1970 CALCUTTA 333 (V 57 C 62)

A. K. DAS AND K. K. MITRA, JJ.

M/s. Narkeldanga Roller Flour Mills and another, Appellants v. The Corporation of Calcutta, Respondent.

Criminal Appeal No. 605 of 1963, D/- 22-8-1969.

(A) Prevention of Food Adulteration Act (1954), Section 2(f) — Adulterated — Meaning of — Sample of wheat containing worms and not insects — No evidence that excess of alcoholic acidity will not disappear after reconditioning — Sample is not adulterated within the section. (Para 6)

(B) Prevention of Food Adulteration Act (1954), Section 2(v) — Food — Meaning of — Stock ordered to be reconditioned — Sample taken before reconditioning — Sample is not from a stock which is food, within Section 2 (v).

(Paras 7, 8, 9)

(C) Prevention of Food Adulteration Act (1954), Section 7 — Adulteration — Liability of owner under Section.

A sample of wheat taken from a stock which is not food within Section 2 (v) of the Act even if found adulterated does not make owner punishable under Section 7 read with Section 16 (1) (a) (i) of the Act. (Para 9)

Sankar Das Banejee and Piasun Chandra Ghosh, for Appellants; Sunil Kumar Basu, for Respondent.

DAS J. — This is an appeal against conviction under Sections 7 (i), 16 (1) (a) (i)

LM/CN/GS4/69/MNT/C

of the Prevention of Food Adulteration Act. The appellant, mill, was sentenced to pay a fine of Rs 2,000/- and the Manager, S. K. Biswas, was sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 2,000/-, in default, to rigorous imprisonment for a further period of six months.

2. Prosecution case is as follows —

The Food Inspector of the Calcutta Corporation visited Narkeldanga Roller Flour Mills Ltd at 17/4, Canal West Road, Calcutta on May, 8, 1959 and took samples from stocks of wheat in the godown of the mill. Three samples were taken from three bags and one of these samples was later found to be worm infested and not conforming to the standard in respect of alcoholic acidity. Sanction was obtained and this prosecution was started. The other two samples were found by the analyst to be good.

3. The defence is a plea of innocence and a further plea that stock accumulated due to fall in demand and failure of food department, Government of West Bengal, to issue quotas. They were informed and thereafter, quotas were issued and the mill was advised to recondition the flour and release the stock. Reconditioning is a recognised process for removal of disparity with standard and it is permitted by the Government and no offence was, therefore, committed.

4. The learned Magistrate found on the basis of the public Analyst's report that these samples were insect infested and also that the alcoholic acidity was higher than the permissible limit. He, therefore, convicted the appellants.

5. Mr. Banerjee challenged the manner in which samples were taken, but we do not propose to go into that question in view of the order that we propose to make.

Relevant portion of the Analyst's report is as follows —

"Microscopical Examination. Wheat starch only. Physical Examination—White and blackish worms present.

Ash . . . 2.1%

Cluten . . . 7.5%

Alcoholic acidity with 90% alcohol — 0.16%.

The public Analyst therefore declares that the sample of atta does not conform to the standard in respect of alcoholic acidity and moreover it is worm infested and therefore adulterated.

The public Analyst's opinion is based upon two deficiencies,

(1) insect infested,

(2) higher alcoholic acidity.

Mr. S. D. Banerjee, learned Counsel for the appellants, has submitted that the opinion on point No. 2 is at variance with the result of physical examination. The analyst found that white and blackish worms are present in the sample but that

is inconsistent with the opinion that it is insect infested. The public Analyst did not point out the extent of the white and blackish worms or their percentage; what he saw does not disclose that there was an abundance of such worms and therefore, the opinion is unreliable. For being 'infested' there must be an abundance of it, without which no offence would be committed.

6. There is some force in the contention but there are larger questions to be considered in this connection. Clause (f) of Section 2 defines the word 'adulterated' and an article of food is said to be adulterated if it is insect infested. By physical examination the public Analyst found blackish worms and the sample there is at best worm infested. Is the word 'worm' synonymous with insect? Did the legislature intend to condemn wheat products due to presence of seasonal worms? The word "insect" is defined in the Oxford Dictionary as "small invertebrate segmented animal having head, thorax, abdomen, and three pairs of thoracic legs, usually, with one or two pairs of thoracic wings". The word "worm" in the same dictionary is defined as "kinds of invertebrate limbless or apparently limbless creeping animal, such as are segmented in rings or are parasite in the intestines or tissues". There is, therefore, a good deal of difference between worms and insects and a sample of food becomes adulterated only when it is insect-infested. In the present sample, however, worms were found to be present and that in our view, does not satisfy the requirements of the definition "adulterated" under Section 2 of the Act. This may also explain why the stock was later advised by the Government to be reconditioned, obviously because wheat products, in which worms appear due to seasonal action, need not necessarily be condemned but may be used as food after reconditioning. There is no evidence that excess of alcoholic acidity will not disappear with reconditioning and the sample therefore cannot be called adulterated.

7. Admittedly, due to shortfall of demand due to seasonal variation considerable stock accumulated in the godown. The mill could not sell unless quota was issued by the Government and thus stock accumulated. The mill could not sell it in the open market and had to wait for the quota. There is no dispute that the stocks of atta are subject to seasonal effect when worm may grow inside the bags. The mill wrote to Government and Government permitted them to recondition the stock forthwith by sieving before disposing of. Exts. 'C' and 'CI' are relevant letters from the Deputy Director of Food to the mill, where Government took notice of the fact that stocks accumulated due to shortfall in demand and a huge stock was found in the godown. Government also accepted by letter Ext. 'C' that due to seasonal variation

in demand, consumption of atta had gone down appreciably during the summer season with the result that the percentage of extraction of atta by flour mills in Calcutta was reduced and that many of the flour mills in Calcutta were caught with stocks of atta and the price of atta in the Calcutta market had gone down. This letter then points out that the flour mills approached the Government in the Food Department for permission to recondition the stock and the stocks were thereafter sampled and the flour mill was advised to recondition the same before disposal. From this correspondence it appears that the stocks often accumulate for no fault of the millers and that Government recognises that these stocks may be issued to the people for food after reconditioning, obviously thereby accepting that it no longer remains adulterated after being reconditioned. This particular mill also similarly applied and was permitted to recondition and offer for sale and quotas were also issued to them. The godown stock from which sample was taken was not therefore food, for it could be issued only after quotas are issued by Government and Government directed reconditioning before issue. Sample taken after reconditioning, if found adulterated, makes the persons liable. We do not know the result after reconditioning, and without reconditions, the stock would not go out as food, and the sample from godown, even if found adulterated, does not make the owner liable. We may however point out that two of the three samples were found good.

8. Mr. Basu argued that the sample was found adulterated owing to excess of alcoholic content also and that we should take no notice of what might happen after reconditioning. We may, however, point out that the sample must be taken from food for human consumption. But if the stock cannot be sold without quota, and if the recognised practice is to recondition before issue, it is difficult to say that this sample was taken from a stock which is food within the meaning of the Food Adulteration Act. Apart from that, these worms grow speedily due to seasonal variation and if a huge stock in bags accumulate in the godown, we do not know how the Mill can check up each and every bag for these seasonal growth and this explains why two out of the three samples were found good. The obvious course is to check before issue to quota holders and recondition such bags as found necessary and samples found adulterated after such reconditioning may alone make the owner liable.

9. In that view of the matter, we do not think that the sample found adulterated was sample taken from food so as to be punishable within the Prevention of Food Adulteration Act.

10. In the result, therefore, we allow this appeal, set aside the order of conviction

and the sentence and acquit the appellants. Appellant No. 2 is discharged from the bail bond.

11. K. K. MITRA, J. : I agree.

Appeal allowed.

1970 CRI. L. J. 1076 (Vol. 76, C. N. 267) ==

AIR 1970 DELHI 154 (V 57 C 33)

FULL BENCH

H. R. KHANNA, C. J., HARDAYAL HARDY
AND V. D. MISRA, JJ.

Ajit Singh and another, Petitioners v. The State, Respondent.

Criminal Misc. (M) No. 179 of 1969, D/- 3-2-1970.

(A) Criminal P. C. (1898), Section 344 — Remand — Magistrate can remand accused to custody beyond 15 days of his arrest in absence of charge-sheet under Section 173 and without taking cognizance of offence. AIR 1956 Orissa 129, Dissented from.

An accused person can, in the absence of a police report under Section 173, be remanded to custody beyond 15 days of his arrest under Section 344. In absence of any words in the Section or in the context it is not permissible to read in the Section a limitation on or condition attached to the power of Magistrate to grant remand only in case a charge-sheet has been put in Court. Likewise the taking of cognizance of an offence is not a condition precedent to the passing of order of remand. AIR 1956 Orissa 129, Diss. from. Case law discussed.

(Paras 7, 13)

The words "postpone the commencement of any inquiry or trial" in Section 344 indicate that an order under that Section can be made at a stage preceding the commencement of inquiry or trial.

(Paras 4, 16)

(B) Criminal P. C. (1898), Section 190 — Cognizance of offences — Taking cognizance — What amounts to.

Though the expression "taking cognizance" has not been defined in the Code, it can be said that before any Magistrate takes cognizance of an offence he must have applied his mind for the purpose of proceeding in a particular way as indicated in the subsequent provisions. When a Magistrate applies his mind not for the purpose of proceeding under the subsequent sections but for taking action of some other kind e.g., ordering investigation under Section 156 (3) or issuing a warrant for the purpose of such investigation, he cannot be said to have taken cognizance of the offence. AIR 1951 SC 207, Rel. on.

(Para 13)

(C) Civil P. C. (1908), Pre. — Interpretation of statutes — Reference to headings prefixed to the Sections.

The headings prefixed to Sections or sets of Sections in some modern statutes are regard-

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ed as preambles to those Sections. They cannot control the plain words of the statute but they may explain ambiguous words.

(Para 16)

(D) Criminal P. C. (1898), Section 170 — Case to be sent to Magistrate when evidence is sufficient — Section 170 does not require that a report in the nature of an incomplete charge-sheet should be forwarded under that section by police before an order of remand under Section 344 is made. (Para 14)

(E) High Court Rules and Orders — Rules and Orders of Punjab High Court, Vol. III, Chapter II-B, Paragraph 10 — Detention of accused in custody — Paragraph 10 does not require that a charge-sheet must be submitted or cognizance taken by Magistrate before he can remand an accused to custody under Section 344, Criminal P. C. (Para 17)

(F) Punjab Police Rules (Reprint Edition), Vol. III, Paragraph 25.26 — Filing of incomplete charge-sheet — Paragraph 25.26 contains instructions for the police and cannot affect procedure to be followed by Criminal Court. (Para 17)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Tripura 6 (V 52)=
1965 (1) Cri LJ 340, Rab Noaz v. State 10
(1964) AIR 1964 Kerala 232 (V 51)=
1964 (2) Cri LJ 300, State of Kerala v. Madhvan Kuttan 10
(1960) AIR 1960 Madh Pra 135 (V 47)= 1960 Cri LJ 608, Shrilal Nandram v. R. R. Agrawal 10
(1956) AIR 1956 Orissa 129 (V 43)=
1956 Cri LJ 909, Artatran Mahasua v. State 12
(1955) AIR 1955 All 462 (V 42)=
1955 Cri LJ 1146, Kalicharan v. State 9, 11
(1955) AIR 1955 All 521 (V 42)=
1955 Cri LJ 1305, Dukhi v. State 9, 11, 12
(1951) AIR 1951 SC 207 (V 38)=
52 Cri LJ 775, R. R. Chari v. State of U. P. 13, 14
(1951) AIR 1951 SC 441 (V 38)=
52 Cri LJ 1491, Tara Singh v. State 15
(1949) AIR 1949 Cal 143 (V 36)=
50 Cri LJ 231, Supdt and Remembrancer of Legal Affairs Govt. of W. B. v. Bidhendra Kumar Roy 9, 12
(1947) 1947-1 All ER 79= 62 TLR 749, Lloyds Bank v. Elliot 7
(1924) AIR 1924 Cal 614 (V 11)=
26 Cri LJ 68, Bhola Nath Das v. Emperor 8
(1910) 1910 AC 409= 79 LJKB 905, Thompson v. Gould & Co. 7
(1910) 1910 AC 444= 79 LJKB 954, Vickers, Sam & Maxim Ltd. v. Evans 7

D. R. Sethi with M/s D. L. Sehgal and Ghanasham Dass, for Petitioners; Bishamber Dayal with D. C. Mathur, for Respondent.

H. R. KHANNA, C. J.:— The short question which arises for determination in this

case is whether an accused person can be remanded to custody for a period beyond 15 days of his arrest in the absence of a police report commonly known as charge-sheet under Sec. 173 of the Code of Criminal Procedure (hereinafter referred to as the Code). According to the petitioners' counsel unless a charge-sheet is submitted a criminal court has no power to remand an accused to custody after 15 days of his arrest and he in such an event must be released on bail. As against that the submission made on behalf of the State is that an accused be remanded to custody by the Court having jurisdiction in the matter under Section 344 of the Code and it is not obligatory to release the accused on bail after 15 days of his arrest even though the charge-sheet has not been put in the Court. The question has arisen in the following circumstances:—

The dead body of Sarjeevan Prakash alias Kaka was found in the fields in the jurisdiction of Timarpur police post on the morning of September 5, 1969. Ajit Singh and Shankar petitioners were arrested by the police on September 17, 1969 under Section 302, read with S. (34-Ed.) of the Indian Penal Code in connection with the murder of Sarjeevan Prakash. The two petitioners were produced before the Magistrate on September 18, 1969 when they were remanded to police custody till September 25, 1969. Further orders remanding the accused to judicial custody were made from time to time till November 15, 1969, when another order for remand was made.

An application for releasing the two petitioners on bail was rejected by the learned Magistrate on October 14, 1969. An application for the release of the petitioners was then made to the learned Sessions Judge who rejected the application by his order dated November 1, 1969. The petitioners then approached this Court. One of the contentions advanced on behalf of the petitioners was that after the expiry of the period of remand, for which the limit prescribed by Section 167 of the Code is 15 days in the whole, no further order for remand could be passed unless a charge-sheet under Section 173 of the Code was forwarded to the Magistrate empowered to take cognizance of the offence. One of us (Hardy, J) then found that there was a serious conflict among the different High Courts on the above aspect of the matter. He, accordingly, expressed the view that the matter should be decided by a larger Bench. The case was then placed before a Division Bench consisting of Hardy and Misra, JJ., who, in view of the sharp divergence of opinion, expressed the view that it should be decided by a Full Bench.

2. Before dealing further with the matter it would be convenient to reproduce Section 167, relevant part of Section 173 and Section 344 of the Code;

"167. (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well founded, the officer-in-charge of the police station or the police officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the State Government shall authorise detention in the custody of the police,

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate."

"173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer-in-charge of the police station shall—

(a) forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of police has been appointed under Section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magis-

trate, direct the officer-in-charge of the police station to make further investigation.

* * * * *

"344. (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(1A) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation — If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand."

3. According to Section 61 of the Code no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. It would therefore follow that the maximum period for which an arrested person can be detained by the police in the absence of a special order of a Magistrate is twenty-four hours excluding the time requisite for the journey from the place of arrest to the Magistrate's Court. If the investigation of the offence, for which the accused is arrested, cannot be completed within twenty-four hours by the police fixed by Section 61 and there are grounds for believing that the accusation or information against the accused is well founded the police are bound under Section 167 of the

Code to forward the accused along with copies of the entries in the diary to the nearest Magistrate.

Such a Magistrate can authorise the detention of the accused in the police custody from time to time for a term not exceeding 15 days in the whole. An order for this purpose cannot be made by a Magistrate of third class or by a Magistrate of second class not specially empowered in this behalf by the State Government. It is, however, not essential that the Magistrate passing the order should have jurisdiction to try the case. While authorising detention in the custody of police under Section 167 the Magistrate has to record his reasons for so doing and this fact would show that the remand is to be granted not as a matter of course but for reasons which have to be put in writing. It may be noticed that the word "remand" as such is not used in Section 167 and what is authorised by the Magistrate for making an order under that section is the detention of the accused in police custody.

4. In some cases, specially those relating to murder, dacoity or conspiracy, it happens that the investigation is not completed within 15 days. Question arises whether the accused in such a case can be kept in custody beyond that period. Section 344 of the Code provides an answer to that. The section deals with postponement and adjournment of proceedings as well as with remand. According to sub-section (1A) of that section, if, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. The words "postpone the commencement of any inquiry or trial" indicate that an order under the above provision can be made at a stage preceding the commencement of inquiry or trial. The order under the above provision can be made by a Court which, according to Section 6 of the Code, includes Courts of Session and Magistrates.

In case, however, an order for remand to custody is made by the Magistrate the proviso to sub-section (1A) makes it clear that the term of the remand shall not exceed 15 days at a time. Reasons have also to be recorded in writing for making an order of remand. The order has also to be signed by the Magistrate. It is further imperative that the Magistrate making the order under Section 344 should have jurisdiction to take cognizance of the offence for which the accused has been arrested.

5. The Explanation to Section 344 is of importance and, according to it, it would constitute reasonable cause for a remand if sufficient evidence has been obtained to

raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand. In order to bring the case within the ambit of the above Explanation it would have to be shown that there is sufficient material already procured to create a suspicion that the accused has committed offence and that there is a likelihood of further evidence being obtained as a result of the remand.

6. According to Section 173 every investigation of an offence shall be completed without unnecessary delay. The provision in this respect underlines the importance of promptitude and diligence in the investigation of cases. It hardly needs to be emphasised that slackness on the part of investigating agency can result in the disappearance of material evidence which might otherwise be available and thus prevent the effective detection of the crime. A duty is therefore cast upon the police by Section 173 of the Code to complete investigation without unnecessary delay. In order to provide a safeguard against any slackness on the part of the police, it has been provided that the accused cannot remain in custody beyond a specified period without the order of the Magistrate. The police have therefore to give reasons and make out a case for the remand of the accused to custody. A Magistrate granting a remand under Section 344 has to bear this in mind and has to be satisfied that there exist good grounds for making an order of remand of the accused to custody. The Magistrate has to keep a balance and should not be oblivious of the fact that an order of remand to custody affects the liberty of an individual who has yet to be found guilty. At the same time the Magistrate has to see that the investigating agency is not deprived of a reasonable opportunity of procuring further evidence which is likely to be obtained as a result of the remand.

In a number of cases it would indeed be essential to make an order of remand because of inability of the police to complete the investigation within a period of 15 days for a variety of causes. Not to do so, would have the effect of hampering the investigation and preventing the conviction of persons guilty of serious crimes like dacoity and murder for lack of full evidence. It may also be mentioned that the accused has to be remanded under Section 344 not to police custody but to judicial lock-up.

7. There is nothing, in our opinion, in Section 344 which makes it imperative that an order for remand can only be made after a charge-sheet under Section 173 of the Code has been forwarded to the Magistrate. In the absence of any words in the section and in the absence of anything in the context, it would, in our view, be not permissible to read in the section a limitation on or condition attached to the power of Magistrate to grant remand only in case a charge-sheet

under Section 173 has been put in Court. As observed on page 33 of Maxwell on Interpretation of Statutes, Twelfth Edition:—

"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Meisey said. 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.' (Thompson v. Gould & Co., (1910) AC 409, at p. 420). 'We are not entitled,' said Lord Loreburn, L. C., 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.' (Vickers, Sons & Maxim, Ltd. v. Evans, (1910) AC 444, at p. 445) A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional. (Lloyds Bank v. Elliot, (1947) 1 All ER 79)."

8. We are fortified in the view which we have taken by the preponderance of authority. In *Supdt. and Remembrancer of Legal Affairs, Govt. of West Bengal v. Bidhindra Kumar Roy*, AIR 1949 Cal 143, Roxburgh and Blank, JJ., observed:

"Section 167 which limits the period of detention to 15 days is applicable both to a Magistrate having jurisdiction to try the case and also to other Magistrate and limits the total period of detention to 15 days. In the case of a Magistrate who has no jurisdiction to try the case he must within the period forward the accused to a Magistrate having jurisdiction. The section then applicable for further detention is Section 344 of the Code and the Explanation to that section indicates, in our opinion, that further remand may be granted before submission of the charge-sheet. Under Section 173 of the Code, the charge-sheet is to be submitted when the investigation is complete. The Explanation to Section 344 of the Code clearly contemplates a stage prior to submission of the charge-sheet and that time is wanted for further investigation; under it the Court having jurisdiction may grant remands in custody if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand"

Bhola Nath Das v. Emperor, AIR 1924 Cal 614 was cited before the learned Judges but they expressed the view that it had not been correctly decided.

9. In *Dukhi v. State*, AIR 1955 All 521, a Division Bench of the Court (Desai and Beg, JJ.) held that where a person is arrested by the police without a warrant, it is not required that he must be released from custody on the expiry of 15 days if the police is still investigating the matter. A Magis-

trate, having jurisdiction to take cognizance of the offence, can avail himself of the provisions of Section 344 without taking cognizance of the offence or while the matter is still under investigation by the police. The learned Judges also overruled the view expressed in an earlier Single Bench case *Kali Charan v. State*, AIR 1955 All 462.

10. In *Shrilal Nandram v. R. R. Agrawal*, AIR 1960 Madh Pra 135, a Division Bench, consisting of A. H. Khan and Shiv Dayal, JJ., observed:

"The only limit on the exercise of the power of the remand under Section 344 is that the Court cannot give a remand for a term exceeding 15 days at a time. This limit for 15 days is for the purpose of enabling the Court to see as to what progress has been made in obtaining further evidence. Each order of remand must be intelligently made and the Magistrate must give reasons for a further postponement of the enquiry or trial. In this view of the matter, I fail to see how the provision of Section 173 of the Criminal Procedure Code is a condition precedent to a remand under Section 344 (1A) of the Criminal Procedure Code"

The above-mentioned three cases were relied upon and similar view was expressed by P. Govinda Menon, J., in *State of Kerala v. Madhvan Kuttan*, AIR 1964 Ker 232. The learned Judge further observed:

"The explanation makes it clear that it relates to a stage where the offence is still under investigation by the police. No investigation can be held after the Magistrate has taken cognizance of the offence and the explanation must, therefore, necessarily refer to the circumstances existing before the taking of cognizance of the offence by the Magistrate. There is nothing to be done by the Magistrate after cognizance is taken on a police report and before the commencement of an enquiry or trial. So postponing commencement of an enquiry or trial may include postponing of taking cognizance of the offence"

The Judicial Commissioner of Tripura also took the same view in *Rab Noaz v. State*, AIR 1965 Tripura 6.

11. On behalf of the petitioners reference has been made to AIR 1955 All 462. As stated above, the view expressed in this case by the learned Single Judge was overruled in the latter Division Bench case of *Dukhi* AIR 1955 All 521. Perusal of the facts of this case goes to show that *Kali Charan* applicant was remanded to custody by City Magistrate, Farukhabad. According to the police report, *Kali Charan* was also involved in cases under Section 420 and other sections of the Indian Penal Code in Uttar Pradesh, Madhya Pradesh, Bombay, Madras and other States. It was held that the City Magistrate, Farukhabad, who had no jurisdiction to try cases relating to the offences committed in Madras and other places, had no power to remand the accused to custody

for a period exceeding 15 days in the whole. Although there were some general observations in that case, the above facts would go to show that they were in the context of the peculiar facts of that case. Be that as it may, a latter Division Bench expressed its disagreement with the view taken in the above case.

12. Another case referred to on behalf of the petitioners is *Artatian Mahasuara v. State of Orissa*, AIR 1956 Orissa 129, decided by Mohapatra and P. V. B. Rao, JJ. The learned Judges in this case held that Section 344 applied only to cases of which the Magistrate had taken cognizance. The learned Judges dissented from the view expressed in *Bidhndra Kumari Roy's case*, AIR 1949 Cal 143 and *Dukhi's case*, AIR 1955 All 521.

13. We are unable to subscribe to the proposition laid down by the learned Judges in the above case as we do not find anything in Section 344 which makes it obligatory on the part of the Magistrate to take cognizance of an offence before remanding the accused to custody. A Magistrate takes cognizance of an offence under sub-section (1) of Section 190 of the Code (a) upon receiving a complaint of facts which constitute such offence, (b) upon a report in writing of such facts made by a police officer and (c) upon information received from any person other than a police officer or upon his own knowledge or suspicion, that such offence has been committed. The expression "taking cognizance" has not been defined in the Code. It can, however, be said that before any Magistrate takes cognizance of an offence under Section 190 he must have applied his mind for the purpose of proceeding in a particular way as indicated in the subsequent provisions. When a Magistrate applies his mind not for the purpose of proceeding under the subsequent sections but for taking action of some other kind, for example, ordering investigation under Section 156 (3), or issuing such a warrant for the purpose of such investigation, he cannot be said to have taken cognizance of the offence. See in this connection *R. R. Chari v. State of Uttar Pradesh*, AIR 1951 SC 207. *Kania, C. J.*, who spoke for the Court in the above case, also referred to clause (b) of sub-section (1) of Section 190 and observed that the police report, referred to in that clause, was evidently "one in a cognizable case when the police have completed their investigation. It would, therefore, follow that the cognizance of an offence in a cognizable case under clause (b) of sub-section (1) of Section 190 can be taken by the Magistrate after the police have completed the investigation.

The question of taking cognizance under the above clause when further investigation has still to be carried out would, therefore, not normally arise. We have already held above that it would not be permissible to read in Section 344 a limitation on the power

of Magistrate to grant remand only in case, a charge-sheet under Section 173 has been put in Court. Likewise, we cannot subscribe to the proposition that the taking of cognizance of an offence is a condition precedent to the passing of an order of remand of the accused to custody under Section 314 of the Code.

14. Reference has been made on behalf of the petitioners to Section 170 of the Code and it is submitted that a report in the nature of an incomplete charge-sheet should be forwarded under that section by the police before an order of remand under Section 344 is made. There is nothing in the language of Section 170 which warrants such a conclusion. Indeed, the said section contains no reference to the submission of a report in the nature of an incomplete charge-sheet. Apart from that, we find that according to the dictum laid down in the case of *Artatran Mahasuara*, on which case reliance has been placed by the petitioners, Sections 170 and 173 are to be read together and contemplate a simultaneous action.

15. Another case to which reference has been made on behalf of the petitioners is *Tara Singh v. State*, AIR 1951 SC 441. What was held in that case, apart from other matters with which we are not concerned, was that where the First Report made by the police to a Magistrate, though called incomplete challan, contains all the particulars required by Section 173 (1) (a) and a second report with a supplementary challan is filed subsequently, giving the names of some formal witnesses, the first report is in fact a complete report as required by Section 173 (1) (a) of the Code and it is not necessarily vitiated by the mere fact that a supplementary challan is subsequently filed. The dictum laid down in the above case dealt with a matter which was essentially different and in our opinion the petitioners cannot derive any assistance from that.

16. Argument has then been advanced on behalf of the petitioners that Section 344 finds its place in Chapter XXIV of the Code, the heading of which is "General Provisions as to Inquiries and Trials". It is urged that as Chapter XXIV relates to inquiries and trials, an order for remand under that Section can only be made during the pendency of an inquiry and trial and not at a stage prior to that. This contention, in our opinion, is not well founded. The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute, but they may explain ambiguous words. (See in this connection *Maxwell on Interpretation of Statutes*, Twelfth Edition p. 11). There is no ambiguity in Section 344 on account of which it may become necessary to refer to the heading of Chapter XXIV of the Code for the construction of the above section. On

the contrary there are indications that all the sections under Sec. 344 (Chapter XXIV Ed?) do not necessarily relate to a stage after the commencement of inquiry or trial. Reference in this connection may be made to Section 337 which is also a part of Chapter XXIV. According to this Section a pardon may be tendered by the authority concerned to a person at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of such person. The grant of pardon to a person at the stage of investigation would normally be before the commencement of inquiry and trial. It would, therefore, follow that all the matters that are dealt with in the Sections under Chapter XXIV of the Code are not those at the stage of inquiry and trial but can also be at the stage of investigation.

17. Reference has also been made on behalf of the petitioners to Rules and Orders of the Punjab High Court, Volume III, Chapter II-B, Paragraph 10, according to which if a remand is granted under Section 344, Criminal Procedure Code, the case is brought on to the Magistrate's file and the accused, if detention is necessary, will remain in magisterial custody. The above provision can be of no assistance to the petitioners because it does not follow from it that a charge-sheet must be submitted or the cognizance of an offence must be taken by a Magistrate before he can remand an accused to custody under Section 344 of the Code. The fact that the case is brought on to the Magistrate's file only indicates that the papers, on which the order for the remand of the accused is made, would become a part of the Court file so that they can be put up for hearing on the next date. Our attention has also been invited to Paragraph 2556 of the Punjab Police Rules, Volume III, Reprint Edition, according to which an incomplete charge-sheet can be put in Court. The above paragraph contains instructions for the police and would not affect the procedure to be followed by a Criminal Court for which purpose we have necessarily to look to the Code of Criminal Procedure.

18. The two accused were, on consideration of the facts of the present case, released on interim bail by the Division Bench before the reference of this case to the Full Bench. Keeping in view all the facts we confirm the interim order and direct that the petitioners may remain on bail during the pendency of the case against them.

Order accordingly.

1970 CRI. L. J. 1081 (Vol. 76, C. N. 268) =

AIR 1970 GOA, DAMAN & DIU 96

(V 57 C 17)

V. S. JETLEY, J. C.

Vinayak Datta Durbhatkar and another, Appellants v. State and another, Respondents.

Criminal Appeal Nos 11 and 19 of 1969, D/- 20-9-1969.

(A) Evidence Act (1872), S. 32(1) — Dying declaration — Can form the sole basis of conviction.

While considering the relevancy and admissibility of a dying declaration, the declaration has to be closely scrutinised as it is not given on oath nor is it subject to cross-examination. But it cannot be said that dying declaration cannot form the sole basis of conviction unless it is corroborated by some other reliable evidence.

A dying declaration stands on the same footing as any other piece of evidence and has to be judged and tested in the light of surrounding circumstances and with reference to principles governing the weighing of evidence. In order to test the reliability of a dying declaration the Court has to see the circumstances in which the dying declaration has been made, for example, the opportunity of the dying man for observation, whether the capacity of the dying man to remember the facts stated had not been impaired at the time he was making the statement and also if the statement has been made at the earliest opportunity and was not the result of tutoring by interested parties. Once the Court has come to the conclusion that the dying declaration is a truthful version as to the circumstances of the death and the identity of the assailants of the victim, there is no question of further corroboration. AIR 1969 NSC 120, Foll. (Paras 4 and 5)

(B) Evidence Act (1872), S. 32(1) — Dying declaration — Recording need not necessarily be by Magistrate.

A dying declaration cannot be said to be unsafe to rely on merely because it is recorded by a Head Constable and not a Magistrate. It is, no doubt, desirable that such a declaration should be recorded by a Magistrate, but for the purpose of law this is not an indispensable requirement. (Para 6)

(C) Evidence Act (1872), S. 32(1) — Recording of dying declaration — Need not be in question and answer form.

It is not an indispensable requirement of law that it should be recorded in a question and an answer form, and not in a narrative form. Recording of a dying declaration in a question and an answer form may perhaps be a better mode but

there can be no hard and fast rule. AIR 1957 SC 904, Distinguished. (Para 6)

(D) Evidence Act (1872), S. 32(1) — Dying declaration — At time of recording declarant not under expectation of death — Admissibility — English and Indian law — Difference between.

In regard to the admissibility of dying declaration, to say that when the deceased made the declaration if there was no prospect of his death then reliance cannot be placed thereon, is to overlook the language of Section 32(1) of the Act. Under that provision such statements are relevant whether the person who made them was or was not at the time when they were made, under expectation of death, whatever may be the nature of the proceeding in which the cause of his death comes into question. This part of the law is a departure from the English law where such statements should be made when the declarant is in settled hopeless expectation of imminent death. The second departure is that such statements are admissible in civil proceedings. Under the English law they are not

(Para 7).

(E) Criminal P. C. (1898), S. 162(1) & (2) — Sub-s. (2) is an exception to sub-s. (1) — Limitation imposed by S. 162(1) — Not applicable to dying declaration.

Under Section 162(1) no statement made by any person to a police officer in the course of investigation is to be used against the accused. Section 162(2) is an exception. Under that provision, a dying declaration made to a police officer during the course of investigation is taken out of the purview of Sec 162(1). In other words, the limitations imposed by Section 162(1) are not applicable to a dying declaration. This legislative step was conceived in public interests so that guilty persons do not escape because the evidence of the victim is not available in Court.

(Para 7)

(F) Criminal P. C. (1898), S. 154 — Person assaulted brought to police station — Oral statement by him to Head Constable that accused assaulted him — Victim removed to Hospital — Another Head Constable recording his statement in Hospital — Statement made in police station cannot be treated as F.I.R. — Later statement only can be said to have been given with object of putting police in motion for investigation.

(Para 7)

(G) Evidence Act (1872), S. 32(1) — Dying declaration — Admissibility — Declaration referring to motive of accused — That part of declaration is not admissible under the section.

Where the deceased refers in his dying declaration to threats given by accused to him then that part of the declaration is not admissible under Section 32(1) of the Evidence Act which has to be strictly

construed. The statement of the deceased, containing a reference to the motive of the accused, is not admissible, as it is not a statement made by him as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death within the ambit and scope of Section 32(1) of the Evidence Act. It cannot take in acts which have no direct relation to death. (Para 7)

(H) Evidence Act (1872), S. 8 — Charge of murder — Threats given by accused to deceased — Evidence referring to, is admissible.

Evidence referring to threats given by accused to deceased is admissible under the section. The threats given by the accused constitute a motive and explain his antecedent conduct. The presence of motive is relevant under the section as it goes to show the mens rea of a crime. It is circumstantial evidence against an accused person. Motive, preparation and opportunity, are mental acts covered by this section. (Para 8)

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| (In No 11 of 1969). —
S. K. Kakodkar, for Appellant; L. C.
Gama, Public Prosecutor, for Respon-
dent | |
| (In No 19 of 1969) — | |

L. C. Gama, Public Prosecutor, for Ap-
pellant; S. K. Kakodkar, for Respondent.

JUDGMENT:— This is an appeal by the appellant, against his conviction under Section 304 Part II of the Penal Code. The sentence passed by the learned Sessions Judge is 8 years' R.I. and a fine of Rs. 300/- and, in default of payment of fine, to undergo further R.I. for 2 months. The charge against the appellant at the trial was that on or about 5th June, 1968 at about 7 a.m. at Bandora village he committed murder by intentionally or knowingly causing death of Fondu alias Babuli Vithu Naik, and thereby committed an offence punishable under Section 302 of the Penal Code. There is also the application by the State for enhancement of the sentence passed. According to the State the conviction should have been under Section 302 of the Penal Code.

2. The prosecution case, in a nutshell, is that the appellant and the deceased were known to each other for some period before the deceased was assaulted by the appellant with a spade on 5th June, 1968, resulting in multiple injuries. The deceased was a sepooy employed by the Shanta Durga Temple Committee. In 1965 the appellant was granted the fishing rights of the sluice gate of a certain field belonging to this temple. In exchange the appellant was required to supervise the bunds of that field. There was negligence on his part in this work and therefore these rights were withdrawn in September, 1965. It was the deceased who reported to the Committee that the appellant was negligent. The appellant then started a case against the Committee. The deceased informed the Secretary and the President of the Committee that the appellant had threatened him. He also according to these office-bearers, threatened them. The appellant lost this case and thereafter filed an appeal. It was three days thereafter that he attacked the deceased with a spade. The deceased was removed to the hospital on 5th June, 1968, with multiple injuries. He expired on 16th June, 1968. The police, after necessary investigation, arrested the appellant on 25th July, 1968. He was thereafter challaned under Section 302 of the Penal Code.

3. The case of the appellant is that he is falsely implicated because of litigation with the Temple Committee. He pleaded an alibi. He adduced evidence in his defence on alibi. He admitted he had been removed from the assignment of fishing rights. He also admitted the institution of a case and an appeal. He denied the allegation that the deceased had been threatened by him.

4. The prosecution evidence consists of— (a) the statement of the deceased that he was assaulted by the appellant with a spade, (b) the statements of some prosecution witnesses soon after the

assault that the deceased informed them that he had been assaulted by the appellant; (c) evidence on antecedent conduct of the appellant; (d) evidence on subsequent conduct of the appellant; and (e) medical evidence. As regards (a) there is the statement of the deceased as to the cause of his death admissible under Section 32(1) of the Evidence Act. The assault took place at about 7 a.m. on 5th June, 1968. The deceased was removed to the Margao Hospital same day at 10.45 a.m. where his statement was recorded by Sebastiao Caero (P.W. 13) at about 2.30 p.m. This statement (Exh. 18) was registered as first information report under Section 324 of the Penal Code. It is an important piece of evidence. It is a short statement and it may be convenient to reproduce it:—

"I am working as a watchman in Devaloy of Shantadurga-Queula. Since 1965 I was entrusted by Devaloy Committee to guard a field denominated "ZUON KORPI KANDDI", situated at Keloshim-Marmagao. In the very year one Shri Vinaica Fotto Durbattkar of Korrzale-Parampo, Modkoi who was looking after a manor "SHANTIGATON" which is adjacent to the referred field, wanted to reap the field in question but as I was maintaining the watch on it I prevented him from doing so and since then the said Vinaica was not in good terms with me. On several occasions he threatened me of being killed but I took it as simple. Today at about 6.30 hrs. I was proceeding to Keloshim in the field as some work is going on in it. On the way, after half an hour of journey and at Nomsh suddenly the said Vinaica Durbattkar came with a Spade (Pahudo) and its thick stick hit on the back side of my neck and in consequence of which I fell down on the ground. Subsequently he gave another hit of iron part on my left ear and thereby I became unconscious. Hearing my shouts some villagers came running and they brought me in sense by giving canjee water. At that time I noticed a severe injury on my right leg and others almost all over the body. At that time Shri Vinaica was not there and further I was brought at the Ponda Police Station. Hence my complaint and request for legal action. The present complaint was read over, explained in Konkani and the contents admitted to be correct."

This statement, recorded as a dying declaration, shows — (1) that the appellant was not on good terms with the deceased, (2) threats by the appellant on several occasions; (3) assault by the appellant with a spade resulting in injuries on neck, left ear and other parts of the body of the deceased, (4) the deceased became unconscious after the assault; (5) presence of some villagers who helped the

deceased to regain consciousness; (6) absence of the appellant when the villagers turned up; and (7) removal of the deceased to the Ponda Police Station and thereafter to Margao hospital. This declaration is to be closely scrutinized as it was not given on oath nor was it subject to cross-examination. That "what the soldier said is not evidence" is one of the best-known rules of law. This "hearsay rule" is strictly followed in criminal cases and for reasons that are obvious. When the life or liberty of an accused person is at stake it is necessary to have first-best and not second-best evidence. There are, however, some exceptions to this rule both under English and Indian law; for example, a dying declaration.

5. Mr S. K. Kakodkar, learned counsel for the appellant, contends that this declaration cannot form the sole basis of conviction unless it is corroborated by some other reliable evidence. This contention is not well founded. In its latest decision (2nd May, 1969) '*Pandharinath Budho Patil v. The State of Maharashtra*', Cr. Special Leave Appeal No 96 of 1967 = (AIR 1969 NSC 120) the Supreme Court observed.—

"It was argued on behalf of the appellant that the High Court was not justified in basing the conviction of the appellant on the dying declaration of Gangadhar after having rejected the evidence of the four eye-witnesses as unreliable. It was said that the dying declaration of Gangadhar ought not to have been acted upon unless there was sufficient corroboration thereof. We are unable to accept this argument as well founded. It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated. It is not also correct to lay down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence. A dying declaration stands on the same footing as any other piece of evidence and has to be judged and tested in the light of surrounding circumstances and with reference to principles governing the weighing of evidence. In order to test the reliability of a dying declaration the Court has to see the circumstances in which the dying declaration has been made, for example, the opportunity of the dying man for observation, whether the capacity of the dying man to remember the facts stated had not been impaired at the time he was making the statement and also if the statement has been made at the earliest opportunity and was not the result of tutoring by interested parties. In order to pass the test of reliability the dying declaration has to be subjected to a very close scrutiny keeping in view the fact that the statement has been made in the absence of the accused who had no

opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration is a truthful version as to the circumstances of the death and the identity of the assailants of the victim, there is no question of further corroboration. (See *Khushal Rao v. State of Bombay*, AIR 1958 SC 22)."

This test of reliability is to be borne in mind before considering the relevancy and admissibility of the dying declaration in the present case. The observations of the Supreme Court in '*Ram Nath v. State of Madhya Pradesh*', AIR 1953 SC 420, to the effect, that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration are in the nature of obiter dicta, as would be clear from the observations made by the Supreme Court in later decisions, see '*Harbans Singh v. State of Punjab*', AIR 1962 SC 439 and AIR 1958 SC 22 (supra). In the words of Bowen, L.J.:—

"I believe that obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases" (1888-38 Ch D 71) "yet there are dicta and dicta", as Lord Esher, M.R. pointed out.

6. It is next contended by Mr S. K. Kakodkar that this declaration was recorded by a Head Constable and not by a Magistrate and therefore it is not safe to rely thereon. This contention also is not well founded. I may agree with him that it is desirable that such a declaration should be recorded by a Magistrate but for the purposes of the law this is not an indispensable requirement. It is also not an indispensable requirement of law that it should be recorded in a question and an answer form, as argued by Mr S. K. Kakodkar, and not in a narrative form. Recording of a dying declaration in a question and an answer form may perhaps be a better mode but there can be no hard and fast rule. Mr. S. K. Kakodkar cites '*Bakhshish Singh v. State of Punjab*', AIR 1957 SC 904 in support of this argument. In that case the dying declaration recorded by a Head Constable was a long document narrative of a large number of instances which happened before the actual assault. It was observed by the Supreme Court at page 906 that:—

"Such long statements which are more in the nature of First Information Reports than recital of the cause of death or circumstances resulting in it are likely to give the impression of their being not genuine or not having been made unaided and without prompting."

The dying declaration was recorded in Urdu in that case while the deceased

spoke in the Punjabi language. The dying declaration, in view of the facts accepted by the Supreme Court, though in the form of first information report, was held unprompted and voluntary in spite of the fact that it contained "long statements". This decision does not help the appellant. The dying declaration, in our case, is a short document in a narrative form. The deceased made this declaration in Konkani language but Head Constable Sebastiao Caeiro (P.W. 13) recorded it in English. The fact that he knows Konkani is not disputed. This language has no written script of its own. Some persons write it in the Roman script while others in the Marathi script. He denied in cross-examination that it was recorded after the death of the deceased on 16th June, 1968. A copy of this declaration was sent to the Magistrate of the area same day, i.e., 5th June, 1968, and was received by him next day, as would be clear from the despatch register of the Ponda Police Station. The deposition of Sub-Inspector Prabhakar Rane (P.W. 15) makes this position clear. The denial by Head Constable is borne out by the record. The further argument of Mr. S. K. Kakodkar, that when the deceased made the declaration there was no prospect of his death and therefore reliance cannot be placed thereon, seems to overlook the language of Section 32(1) of the Evidence Act. Under that provision "such statements are relevant whether the person who made them was or was not at the time when they were made, under expectation of death, whatever may be the nature of the proceeding in which the cause of his death comes into question". This part of the law is a departure from the English law where such statements should be made when the declarant is in "settled hopeless expectation of imminent death". The second departure is that such statements are admissible in civil proceedings. Under the English law they are not

7. Having dealt with these preliminary contentions, I would next consider the circumstances in which the dying declaration was made. The deceased was assaulted at about 7 a.m. on 5th June, 1968 and he was brought in a taxi by Sadguranath Sungtankar (P.W. 6), Secretary of the temple committee, to the Ponda Police Station at about 8 a.m. same day. He informed him that he had been assaulted by the appellant with the spade. He also informed Head Constable Salvador Noronha (P.W. 12) that the appellant had assaulted him. This information was given by him at the earliest possible opportunity before his statement was recorded as first information report. This and other corroborative pieces of evidence I shall consider later when I come to item (b) of the prosecu-

tion evidence. There was no possibility of tutoring the deceased at that stage. He knew the appellant very well. This fact is not in dispute. The assault took place early morning when there was enough light. As will appear from the medical evidence which will be discussed hereafter the deceased was given a number of blows on almost all parts of his body. It was not a case of a single blow given with lightning rapidity followed by a rapid run in a by-lane or a street. The deceased had an adequate opportunity to observe and recognize the appellant. This is not a case of mistaken identity, as rightly submitted by Mr. L. C. Gama, learned Public Prosecutor. Mr. S. K. Kakodkar invites my attention to 'Proof of Guilt' by Glanville Williams, an author of international repute, wherein at page 106 it is stated, "In England and America most of the spectacular miscarriages have been due to wrong identification of the defendant as the culprit". He also invites my attention to the opinion of the learned author, reached as a result of deep study and research, that "The major source of error was found to be the identification of the accused by the victim of a crime of violence". This opinion is entitled to respect but the present case does not fall in this category. There are cases and cases. The physical capacity of the deceased to make the statement to Head Constable Sebastiao Caeiro (P.W. 13) was not impaired. There is no suggestion to that effect at the Bar. The statement narrates the manner of the attack. It mentions the blows given on the ear and the neck with a spade. The deceased survived for 11 days after the assault. The statement by the deceased was accepted and acted upon by the learned Sessions Judge and I see no good reason to differ from his assessment. The argument of Mr. S. K. Kakodkar that because the deceased died after about 11 days therefore the basic justification for admitting the declaration under Section 32(1) of the Evidence Act is at stake has not the support of law. There is no reason why Head Constable Sebastiao Caeiro should make a false record. One thing more before I close discussion on this aspect of the case. The declaration made to Head Constable Sebastiao Caeiro is recorded as first information report under Section 154 of the Code of Criminal Procedure. According to Mr. S. K. Kakodkar the statement made by the deceased to Head Constable Salvador Noronha (P.W. 12) that he had been assaulted by the appellant being prior in time, should be regarded as F.I.R. and not the later statement made to Head Constable Sebastiao Caeiro (P.W. 13). He argues that this later statement is hit by Section 162(1) of the Code of Criminal Procedure. This argument does

not take into consideration the provisions of Section 162(2) of the Code of Criminal Procedure, assuming the statement made to Head Constable Salvador Noronha is to be regarded as FIR Under Section 162(1) no statement made by any person to a police officer in the course of investigation is to be used against the accused. Section 162(2) is an exception. Under that provision, a dying declaration made to a police officer during the course of investigation is taken out of the purview of Section 162(1). In other words, the limitations imposed by Section 162(1) are not applicable to a dying declaration. This legislative step was conceived in public interests so that guilty persons do not escape because the evidence of the victim is not available in Court. It may be stated that the oral statement made to Head Constable Salvador Noronha was not complete in itself. The first priority for the Police was removal of the deceased to the Margao Hospital. The statement by the deceased to Head Constable Sebastiao Caeiro was given with the object of putting the Police in motion in order to investigate. This cannot be said of the statement to Head Constable Salvador Noronha. The learned Public Prosecutor next drew my attention to the statement of the deceased regarding threats given by the appellant but this part of the statement is not admissible under Section 32 (1) of the Evidence Act which has to be strictly construed. A statement of the deceased, prior to his death, containing a reference to the motive of the accused, is not admissible, as it is not a statement made by him "as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death" within the ambit and scope of Section 32 (1) of the Evidence Act. It cannot take in acts which have no direct relation to death. The statement as to threats may be admissible under Section 8 of the Evidence Act. This aspect of the case I would consider when I deal with the antecedent conduct of the appellant. The deceased died as a result of the injuries inflicted and therefore, the declaration made by him can be used against the appellant. The legal position would be different if death is not due to injuries caused. For my part as I consider this matter, I would regard the declaration in this case as a true version as to the circumstances of the death of the deceased and also on the identity of the appellant as the person who assaulted the deceased with the spade (M O 1) it does not suffer from any serious infirmities, as stated by Mr. S K Kakodkar.

8. Mr. L. C Gama, learned Public Prosecutor, submits that the prosecution case does not rest solely on the dying declaration of the deceased and that there is corroborative evidence in support thereof.

This is so. This corroborative evidence consists of the statements of some prosecution witnesses to whom the deceased complained that he had been assaulted by the appellant with a spade. Vinaeca Gaudo (P W. 4), Esvonta Gaudo (P W. 3), Domingos Dias (P W. 5), Sadguranath Sungtankar (P. W. 6) and Prabhaker Kuvelker (P W 16) were informed by the deceased soon after the incident of assault and before he was taken to the Ponda Police Station that the appellant had assaulted him with a spade. Esvonta Gaudo, Vinaeca Gaudo and Domingos Dias passed by the place of the assault shortly after the incident. They were examined by the Police on 17th June, 1968 after the death of the deceased on 16th June, 1968. Dr. Prabhaker Kuvelker, President of the Temple Committee, was also examined on that date. The possible reason for not examining them earlier seemed to be that the offence reported on 5th June, 1968 was registered under Section 324 of the Penal Code, a minor offence as compared to the offence of murder. The Police did not take this offence seriously in the beginning. The Police became more serious after the deceased died on 16th June 1968. This approach has not the support of law. It is in the evidence of Esvonta Gaudo that he went to Sadguranath Sungtankar and informed him that the deceased had told him that he had been injured by the appellant with a spade and that thereafter the appellant had run away. Sadguranath Sungtankar came to the place of the assault and there he found Vinaeca Gaudo. Mr. S. K. Kakodkar fairly concedes that Sadguranath Sungtankar and Dr. Prabhaker Kuvelker are respectable witnesses but he argues that because of the litigation pending between the Temple Committee on the one hand and the appellant on the other, accompanied by threats to them, they readily persuaded themselves to believe that the appellant was the assailant. This argument does not impress me. They are definite that it was the deceased who said he had been assaulted by the appellant and I am satisfied that they are not drawing upon their imagination. Esvonta Gaudo and Vinaeca Gaudo were there at the place of the offence and their evidence and also the evidence of Sadguranath Sungtankar and Dr. Prabhaker Kuvelker has been considered reliable by the learned Sessions Judge. The examination of Esvonta Gaudo and Vinaeca Gaudo by Police at a late stage, I may have viewed with some suspicion, but for the fact that they were seen by Sadguranath Sungtankar at the scene of the offence soon after the assault. The learned Sessions Judge had the advantage of observing their demeanour and there is no good reason why their evidence should be discarded. Sadguranath Sungtankar and Dr. Prabhaker Kuvelker also deposed to

the threats given by the appellant to them and the deceased. This part of their evidence has also been accepted by the learned Sessions Judge. The threats given by the appellant constitute a motive and explain his antecedent conduct. The appellant was annoyed because the fishing rights in his favour were withdrawn by the Temple Committee at the instance of the deceased. The presence of motive is relevant under Section 8 of the Evidence Act, as it goes to show the mens rea of a crime. It is circumstantial evidence against an accused person. Motive, preparation and opportunity, are mental acts covered by this section. When there is clear and reliable evidence that an accused has committed a crime, the question of motive is not of much significance: 'Gurcharan Singh v. State of Punjab', AIR 1956 SC 460, but the present case is not one where the death caused is motiveless. The motive in this case lends additional support to the finding that the appellant is guilty. Mr. S. K. Kakodkar says that the motive in this case is too remote in time and that the time interval between the incident and grudge is not proximate. Mr. L. C. Gama submits that the incident of assault took place about three days after the appeal filed by the appellant. This is so. Revenge harboured and nursed is not governed by any rule of limitation. It is also not governed by reason. It has a technique of its own. The evidence on the subsequent conduct of the appellant is that he absconded after the assault. This evidence also is relevant under this section. The plea of an alibi and also the evidence thereon by Puti Chodankar (D. W. 1) has not been believed by the learned Sessions Judge and for good reasons. Mr. S. K. Kakodkar submits that this evidence is reliable. I have been taken through this evidence and the observation of the learned Sessions Judge that it does not appear to be reliable is correct. Mr. S. K. Kakodkar is right when he states that failure to establish an alibi does not relieve the prosecution of the burden of proving the case beyond reasonable doubt. This proposition is well settled. I have nothing more to say on the prosecution evidence at Items (c) and (d) except that I would repeat that the appellant and no one else assaulted the deceased.

9. The prosecution evidence at Item (e) is medical evidence of an advisory nature given on the data placed before the medical officers examined on behalf of the prosecution. Their evidence is primarily an evidence of opinion and not of fact. Dr. Germano Menezes examined the deceased at the Ponda Hospital at about 8 a. m. on 5th June, 1968. He suspected fracture of the ribs of the deceased. He noticed that the deceased was finding some difficulty in respiration. He sent him to the Margao

Hospital. Dr. Agostinho Lourenco (P. W. 7) examined the deceased after his admission at the Margao Hospital at 10.45 a. m. and found the following injuries:— 1. An incised wound, transversal on the left ear stitched with two stitches, 2. Two incised wounds, one on the left frontal face about 3 cms in length, superficial and the second about 2½ cms. in length, on the left parieto occipital region bone deep; 3. Fracture of the ribs; 4. Two extensive abrasions on the left forearm and on left elbow and a third small abrasion on the nose; 5. An abrasion on the left knee joint; and 6. Compound fracture of the right leg. The deceased was x-rayed immediately, and he noticed fracture of the right leg bone and also fracture of the 5th, 7th and 8th right ribs. There was no sign, according to him, of the fracture of the skull or effusion of the chest. The deceased was operated upon at about 3.30 p. m. same day. He made satisfactory progress for 9 days after the operation but on the 16th at about 10.00 a. m. he fainted suddenly and thereafter died at about 11.45 a. m. The death of the deceased, according to him, was probably due to pulmonary embolism which is a consequence of fracture of the leg. In his opinion, the injuries caused to the deceased were not sufficient in the ordinary course of nature to cause death. Dr. Mablou Borker (P. W. 10) performed the post-mortem on the corpse of the deceased on 17th June at about 10 a. m. Apart from the injuries noticed by Dr. Agostinho Lourenco, he found a fissured fracture of the left parietal bone 5 cms. long running antero-posteriorly just under the injury of the scalp. This injury, according to him, corresponded to the incised wound about 2½ cms. in length on the left parieto-occipital region bone deep, noticed by Dr. Agostinho Lourenco as injury No 2. The injuries, according to him, were all ante-mortem. In his opinion, the death was due to the failure caused by ischaemia of the heart due to the internal haemorrhage accelerated by the toxæmia from the infected fracture of the right leg and cumulative effect of multiple injuries causing deterioration of the functions of the vital organs. In simple words, the death was due to the cumulative effect of the multiple injuries including fractures. He expressed the opinion that the injuries caused were likely to cause the death of the deceased. They were caused, according to him, by a heavy blunt cutting weapon. The spade recovered from the place of the offence, in his opinion, could cause these injuries. The injuries on the ear and the neck lend support to the declaration of the deceased discussed earlier.

10. The next question for consideration is whether on the basis of the medical evidence noticed above what offence is committed? Is it murder — a more

heinous offence — or culpable homicide not amounting to murder—a less heinous offence. In this connection the application made on behalf of the State for enhancement of the sentence passed by the learned Sessions Judge may be considered at this stage. According to that application the offence falls under clause '2ndly' of Section 300 of the Penal Code. This also is the submission of Mr Gama. Mr. S. K. Kakodkar states that the offence falls under Section 326, I P C. They are not right in their submissions. Let us turn to Sections 299, 300 and 304 of the Penal Code. Section 299 defines 'culpable homicide.' Section 300 explains when culpable homicide is murder, a more heinous offence. Under that section, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death or in the manner indicated in clauses '2ndly', '3rdly' and '4thly.' This section also contains exceptions where culpable homicide is not murder. Section 302 provides punishment for culpable homicide amounting to murder. Section 304 provides punishment for culpable homicide not amounting to murder. Now, it is common ground, that the appellant did not assault the deceased with the spade with the intention of causing his death. Clause '1stly', in Sec 300, therefore, is inapplicable. Clause '2ndly' is erroneously invoked on behalf of the State, as would be clear from the illustration (b) appended to this section. This clause will apply if the assault by the appellant was committed with the intention of causing such bodily injury as the appellant knew to be likely to cause the death of the deceased to whom the harm is caused. This was not the prosecution case at the trial, nor does it arise on the evidence recorded at the trial. Mr Gama then fell back on clause '3rdly', clause '4thly' admittedly being inapplicable. Clause '3rdly' regards culpable homicide as murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The scope and application of this clause has been considered by the Supreme Court in more than one decision. It will suffice if reference is made only to 'Harjinder Singh v. Delhi Administration', AIR 1968 SC 867. This decision reviews two other decisions of the Supreme Court, 'Virsa Singh v. State of Punjab', AIR 1958 SC 465 and 'Rajwant Singh v. State of Kerala', AIR 1966 SC 1874. In Rajwant Singh's case, AIR 1966 SC 1874 reviewed in this decision, Hidayatullah, J. (as he then was), speaking for the Supreme Court observed

"As was laid down in 1958 SCR 1495 = AIR 1958 SC 465 for the application of this clause it must be first established that

the injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established."

In Virsa Singh's case, AIR 1958 SC 465 Bose J., delivering judgment on behalf of the Supreme Court, observed that the enquiry for the purposes of this clause:—

".....is broad-based and simple and based on commonsense; the kind of enquiry that "twelve good men and true" could readily appreciate and understand. To put it shortly, the prosecution must prove the following facts before it can bring a case under Sec 300 "thirdly"; First, it must establish quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved; These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and, fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly".

11. Let us now apply the principles enunciated by the Supreme Court. The medical evidence is silent on the question whether any individual injury was fatal. The injuries cumulatively were responsible for the death of the deceased. This is pretty certain. According to Dr Agostinho Lourenco, the injuries caused were not sufficient in the ordinary course of nature to cause death. I accept this opinion. The sufficiency is the high probability of death in the ordinary way of nature. Therefore, the objective test is not satisfied. This will rule out the application of this clause apart from the fact that the subjective test also is not satisfied. The appellant did not attack the deceased with a sharp cutting instrument such as a sword, knife etc. In certain circumstances even attack with blunt weapons like iron-shod 'lathees' may bring the offenders within the 'purview' of this clause. There are cases and cases. The

attack was with the spade on almost all parts of the body of the deceased and it was indiscriminate in its nature. This would be clear from the totality of the circumstances on the record. The second incised wound (injury No. 2) noticed by Dr. Agostinho Lourenco may have proved fatal but this is a conjecture, apart from the fact that it cannot be said that the appellant intended to cause that particular wound. I have no doubt that clause '3rdly' is not attracted. The appellant has not relied on any exception in Section 300 and, therefore, we have necessarily to fall back on Section 299. It will be noticed that Section 299 is in three parts. The first part applies where death is caused by doing an act with the intention of causing death. This part and clause '1stly' in Section 300 are similar. The second part applies where death is caused by doing an act with the intention of causing such bodily injury as is likely to cause death. The intention here must be to cause the particular bodily injury as is likely to cause death. The probability of death is there, but not a high probability of death in the ordinary way of nature, as envisaged by the objective test in clause '3rdly' in Section 300. The difference seems to be in degree and not in kind. The third part applies in this case and therefore, the offence is punishable under Part II of Section 304 of the Penal Code. Under that part, culpable homicide not amounting to murder is punishable where the act by which death is caused is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. Where such an act is done with the intention of causing death or of causing such bodily injury as is likely to cause death, it will attract part I of Section 304 of the Penal Code and not Part II thereof. This would be a case of culpable homicide not amounting to murder as in Part II. This section takes in, within its sweep the exceptions enumerated in Section 300 where the requisite intention as envisaged in Section 304 is present. As stated already, the blows with the spade were given indiscriminately with the knowledge that the appellant was likely thereby to cause the death of the deceased. The spade had an iron covering at its bottom. Knowledge envisaged under Part II of Section 304 is an awareness of the consequence of a criminal act. The appellant could not have foreseen as substantially certain the death of the deceased, although he should have known that death would be the probable result. The manner of causing the injuries, the nature of the injuries caused, parts of the body where they were caused, the weapon used in the commission of the offence and the conduct of the accused are relevant factors

in considering whether the offence is murder or culpable homicide not amounting to murder. 'Hayati Usta v. State', AIR 1967 Goa 11. The ribs of the deceased were fractured with the spade. Its iron part caused the incised wounds on the face and in the region of the head of the deceased resulting in a fissured fracture beneath the scalp. A spade is a weapon likely to cause death. The argument of Mr. Kakodkar that Section 326 of the Penal Code applies in this case is devoid of substance. It does not deserve serious consideration.

12. Mr. S. K. Kakodkar finally submits that the sentence passed on the appellant under Section 304, Part II is rather harsh. The maximum sentence of imprisonment under that Section is 10 years. The attack in this case was pre-meditated. The object of the appellant was to wreak revenge. Revenge is a kind of wild justice. The following lines of permanent literary value from 'Merchant of Venice' by Shakespeare, if I may cite them, are apt in the context:

"If I can catch him once upon the hip, I will feed fat the ancient grudge I bear him."

It is gratuitous to search a man's mind for motives other than the age-old ones of the desire for revenge, greed, easy money, lust, passion and cruelty. It is well settled that in the matter of the sentence discretion exercised by the trial Court is not to be lightly interfered with. It is also well settled that the exercise of discretion as to the question of sentence is a matter of prudence and not of law. In 'Pandurang v. State of Hyderabad', AIR 1955 SC 216 the Supreme Court observed that the question of sentence is and must always remain a matter of discretion unless the law otherwise directs. It is true that there are cases where a sentence of five years under this section was passed. There are also cases where a higher sentence was passed, depending upon the facts and circumstances of each case. I am not satisfied that the discretion vested in the learned Sessions Judge in this case has been arbitrarily exercised. This discretion cannot be cabined and confined within the strait-jacket of a set formula. As regards the order imposing fine, there is little justification and accordingly it is set aside. The conviction and the sentence of imprisonment under Section 304, Part II, recorded by the learned Sessions Judge are maintained for the reasons mentioned above, except in regard to the fine. In this view of the matter the appeal filed on behalf of the appellant is rejected. The application for enhancement of the sentence passed under Section 439 of the Code of Criminal Procedure must also share the same fate. Order accordingly.

Order accordingly.

1970 CRI. L. J. 1090 (Vol. 76, C. N. 269) =
AIR 1970 GUJARAT 157 (V 57 C 25)

J. M. SHETH AND D. P. DESAI, JJ.

M. B. Kharade and another, Petitioners
v. State of Gujarat, Opponent.

Criminal Revn. Applns. Nos. 95 and 102
of 1969, D/-8-7-1969, against order of Spl.
J., Ahmedabad (Rural) at Narol in Spl. Case
No. 5 of 1968 and Spl. J., Ahmedabad City
in Spl. Case No. 15 of 1968.

(A) Bombay Police Act (22 of 1951), S. 3
— One police force for the whole State—
Anti-Corruption Unit separated from office
of Inspector-General of Police and brought
under direct control of Government — No
contravention of section — It is not creating
separate or second police force in the State.
(Paras 9, 11)

(B) Bombay Police Act (22 of 1951),
S. 5(a) — Constitution of Police Force—
Power of Government to organise police
force does not mean power to bifurcate
police force — Government passing resolu-
tion to separate Anti-Corruption Unit and
bringing it under its direct control — There
is no bifurcation of police force. (Para 11)

(C) Bombay Police Act (22 of 1951),
S. 2(11) — "Police Officer" — He must
be appointed under Act — It is not neces-
sary that he should be under the control
of Inspector-General of Police, Police offi-
cer who is a member of Anti-Corruption
Bureau directly working under Government
is a "police officer" within S. 2(11).
(Para 9)

(D) Prevention of Corruption Act (1947),
S. 5-A — Investigation into cases under
Act — Investigation by police officer below
one specified in section — Granting of
permission by Magistrate — Examination of
question by Magistrate whether any other
officer mentioned in section was available
will have no bearing upon the legality of
permission granted by him. AIR 1969 Guj
362, Applied. (Para 13)

Cases Referred: Chronological Paras

(1969) AIR 1969 Guj 362 (V 56) =
Criminal Revn. Appln. No. 270 of
of 1968 = 1969 Cri. LJ 1503,
M. B. Tharda v. State of Gujarat 13
R. J. Shethna, for Petitioners, G. T.
Nanavati, Assistant Govt. Pleader, for
State.

DESAI, J: Both these matters have been
referred to a Division Bench by our brother
Sarela J., on account of the questions of
law raised. The order in Criminal Revn.
Appln. No. 95 of 1969 which is challenged
before us was passed by Mr. D. J. Dave, as
Special Judge, Ahmedabad (Rural) at Narol
on 17-12-68 and the order in Criminal Revn.
Appln. No. 102 of 1969 was passed by
Mr. M. P. Thakkar, Special Judge, Ahmeda-
bad City, on 28-2-1969. These two orders
were passed in Special Case No. 5 of 1968

and Special Case No. 15 of 1938 pending
before the respective Special Judges.

2. In Criminal Revn. Appln. No. 95 of
1969, the facts are that the Government
appointed Mr. D. J. Dave, Assistant Judge
and Additional Sessions Judge, Ahmedabad
(Rural) at Narol, to be a Special Judge for
the District of Ahmedabad (Rural) to try
the offences specified in Section 6 of the
Criminal Law Amendment Act, 1952, by
notification dated June 20, 1966. Then by
notification dated May 13, 1968, Mr. D. J.
Dave was appointed by Government to
officiate as Chief Magistrate for the City of
Ahmedabad vice Mr. D. C. Mehta who
proceeded on leave from 29th April, 1968
to 7th June, 1968 with permission to suffix
8th and 9th June, 1968 which were holi-
days. Thereafter, by notification dated
May 29, 1966, the High Court reposted
Mr. D. C. Mehta as Chief City Magistrate
for the City of Ahmedabad on his return
from leave and reposted Mr. D. J. Dave as
Assistant Judge, Ahmedabad (Rural) at
Narol, on his relief by Mr. D. C. Mehta.
The charge-sheet against the petitioner in
Criminal Revn. Appln. No. 95 of 1969 was
submitted by the police on October 28, 1968.
Thereafter on November 22, 1968, the Gov-
ernment issued another notification under
Section 6 (1) of the Criminal Law Amend-
ment Act, 1952, in supersession of the previ-
ous notification dated June 20, 1966. By
this notification Mr. D. J. Dave, Assistant
Judge and Additional Sessions Judge,
Ahmedabad (Rural) at Narol was appointed
to be the Special Judge for the Ahmedabad
Revenue District excluding the City of
Ahmedabad. By the same notification
Mr. S. L. Talati, Joint Judge and Additional
Sessions Judge, was appointed as Addi-
tional Special Judge for Sabarkantha Re-
venue District. It was after this notification
that the petitioner submitted application
dated November 30, 1968, in Special Case
No. 5 of 1968 questioning the jurisdiction
of Mr. D. J. Dave to commence the trial
against him on the ground that on his ap-
pointment as Chief City Magistrate for the
City of Ahmedabad, he ceased to be the
Assistant Judge and Additional Sessions
Judge, Ahmedabad (Rural) at Narol and,
therefore, ceased to be the Special Judge
for that area. As per the submission in
this application the reposting of Mr. D. J.
Dave as Assistant Judge, Ahmedabad
(Rural) at Narol did not automatically con-
fer power on him as the Special Judge of
that area "in the absence of a fresh ap-
pointment in accordance with the provisions
of Section 6 of the Criminal Law Amend-
ment Act, 1952". Another contention was
also taken in this application which raises
a common question of law in both these
revision applications before us. That con-
tention was that the Anti-Corruption Branch
of the State Government having been
made independent from the local Police
force under the control of the Inspector-
General of Police, its officers cannot be

said to be the Police officers because the Anti-Corruption Branch was made independent by the State Government without any authority of law and in contravention of the provisions of the Bombay Police Act, 1951 (hereafter referred to as 'the Act'), under which there can be only one police force. It was further submitted that the police officer of Anti-Corruption Branch who had submitted police report or charge-sheet on October 28, 1968, was thus not a police officer and the charge-sheet submitted by him could not be said to be a police report upon which the Special Judge could take cognizance of the offences disclosed in the police report. In view of these two contentions it was prayed that appropriate orders may be passed on the ground that the Special Judge has no jurisdiction to commence the trial.

3. In Criminal Revn. Appln. No. 102 of 1969 the charge-sheet was submitted by Mr. Solanki, P. S. I., Anti-Corruption Bureau, before the Special Judge for the City of Ahmedabad. In that case being Special Case No. 15 of 1968, the petitioner-accused gave application to the Special Judge objecting to the investigation by Mr. Solanki on the ground that Mr. Solanki was not a police officer because of creation of Anti-Corruption Bureau as an independent force in contravention of the provisions of law. This ground is similar to the second ground which was urged before Mr. Dave at Narol. A further ground was also taken before the Special Judge at Ahmedabad as regards the legality of investigation and it was the duty of the learned Magistrate who granted permission to investigate the offence to Mr. Solanki to get himself satisfied not merely about the absence of superior officers in the Anti-Corruption Branch but also the non-availability of other officers of the general police force in the City of Ahmedabad. In the course of argument on this application before the Special Judge of Ahmedabad it was urged that the learned Magistrate acted mechanically in granting permission to P. S. I. Solanki because he did not satisfy himself about the non-availability of other police officers of the general police force who were entitled under the law to investigate this offence. Another contention was also taken up and it was this. According to Mr. Solanki the date of giving bribe was fixed between the bribe-giver and bribe-taker as June 29, 1968, whereas the superior police officers, no doubt, were out of station on June 28, 1968, but there was nothing to show that they were to continue to remain out of station on June 29, 1968. It was urged that the learned Magistrate failed to realise that the material date with reference to which the date of availability of the superior police officers had to be judged was June 29, 1968. It was urged that in overlooking this aspect the learned Magistrate failed to apply his mind in granting permission.

4. In passing the order from which Criminal Revision Application No. 95 of 1969 arises, Mr. Dave held that his powers as Special Judge were not withdrawn by the State Government while he was officiating as Chief City Magistrate and therefore those powers continued as conferred upon him under the original notification of 1966. He also pointed out that thereafter by notification published in the Gazette dated 5-12-1968 the Government of Gujarat have appointed him as Special Judge for Ahmedabad Revenue District excluding the City of Ahmedabad. He, therefore, held that he had power to take cognizance of the offences in question. He overruled the contention that the investigation in this case was not by a police officer and that the report submitted by him was not a police report.

5. The learned Special Judge of Ahmedabad also came to the conclusion that P. S. I. Solanki was a police officer and did not cease to be so by setting up of the Anti-Corruption Bureau as an independent unit. He also came to the conclusion that the Magistrate had not acted mechanically in granting permission to investigate the offence. Thus, in both the cases the applications by the accused-petitioners were rejected by the respective Judges and against those orders the accused have come in revision.

6. At the hearing of those applications, Mr. Shethna for the petitioners in both the applications contended that the independence given to the Anti-Corruption Bureau from the control of the Inspector General of Police by the Gujarat State by its resolution dated September 30, 1963 is ultra vires the provisions of the Bombay Police Act, 1951. Therefore, the officers attached to the Anti-Corruption Bureau were not police officers and no cognizance could have been taken on the report submitted by such officers as a result of an illegal investigation carried out by them. The second submission of Mr. Shethna was that Mr. Dave, Additional Sessions Judge at Narol ceased to be a Special Judge on his appointment as officiating Chief City Magistrate for the city of Ahmedabad from the moment he took charge of that post. Therefore, in the submission of Mr. Shethna unless and until there was a fresh notification issued by the State Government under Section 6 of the Criminal Law Amendment Act, 1952, the powers of Special Judge were lost to Mr. Dave and he has no jurisdiction to take cognizance of the offences in the case submitted to him. Lastly, Mr. Shethna contended that the investigation carried out by P. S. I. Solanki in the case pending before the Special Judge of Ahmedabad was illegal because the city Magistrate who granted permission under Section 5A of the Prevention of Corruption Act, 1947 did not satisfy himself about the requirement of Sec. 5A. In develop-

ing his submission, on the first point Mr. Shethna contended that the provisions of Section 3 of the Bombay Police Act, 1951 which laid down that there shall be one police force for the whole of the State of Gujarat were mandatory. He then invited our attention to the provisions of Sections 4, 5, and 6 of that Act and laid particular emphasis on the provisions of Section 6 (1) which provided for the appointment of an Inspector General of Police for the direction and supervision of the police force. These provisions will be set out at a later stage. Mr. Shethna's contention is that by notification dated 30-9-1963 the State Government set up a separate Anti-Corruption Bureau under the direct control of the Government in the Home Department and in doing so set at naught the powers of the Inspector General of Police under Section 6 (1) to direct and supervise the police force. In his submission this power could not be taken away by the State Government even if it purported to organise the police force because it was the statutory power. At one stage he also submitted that on account of creation of the Anti-Corruption Bureau as an independent unit, the power which the Inspector General of Police had, as police officer of the superior rank under Section 551 of the Criminal Procedure Code, was also taken away. In his submission the entire police force of the State should be under the direction and supervision of the Inspector General of Police and the police force cannot be so organised so as to take away this power of direction and supervision and vest it in some other authority. That according to Mr. Shethna, would tantamount to creation of another police force in the State which would be in clear violation of Section 3 of the Act. He, therefore, urged that the Anti-Corruption Bureau has been created in violation of these mandatory provisions and therefore any officer of that Bureau cannot be considered to be police officer. If that is the position then in the submission of Mr. Shethna such an officer has no power to investigate the offences in question and the investigation by such an officer would be illegal. It was also contended that the formation of opinion by such an officer and the submission of report on the basis of that opinion would not be a police report under Sec 173 of the Criminal Procedure Code and therefore on such a report the Special Judge cannot take cognizance of the offences in question. It was Mr. Shethna's contention that power of direction and supervision of the police force in the State is conferred in express terms by Section 6 (1) of the Act and in the alternative he submitted that in any case that power can necessarily be implied from the provisions of Section 6 (1). Therefore, in his submission any power of direction and supervision conferred on any officer other than the Inspector General of Police being

inconsistent with the power of Inspector General of Police is not legal.

7. As against these submissions, Mr. Nanavati, Assistant Government Pleader, relied upon the definition of police officer contained in Section 2 (11) of the Act and submitted that the question that we have to determine is whether the investigating officer in each of these cases is a police officer as defined by these provisions. In his submission if that officer is a police officer as defined by these provisions then the fact that he is subject to the control of authority (A) or authority (B) does not affect his status as a police officer. He also relied upon Sections 3, 4, 5 and 6 of the Act and submitted that the superintendence of the police force throughout the State of Gujarat was in express terms vested in the State and the purported exercise of power of direction and supervision by the Inspector General of Police or its conferment would not restrict the power of superintendence conferred upon the State Government under Section 4 of the Act. He then pointed out that Section 5A of the Act provides that the State Government had power to determine the number, ranks and organization of the police force as well as its powers and functions and duties subject to the provisions of the Act. In his submission Section 6 provided for appointment of an Inspector General of Police so that the State which has the final control in the matter relating to the police force may act through the agency of the Inspector General of Police. In his submission no powers of direction and supervision have been conferred upon the Inspector General of Police under Section 6 of the Act which cannot be determined or taken away by the State Government. In this connection he urged that we should read Section 4 of the Act along with Section 6 and that Section 4 is the overriding provision of the Act which controls Section 6. He submitted that there was nothing to show that the State police force must be subject to the control of the Inspector General of Police alone and urged that Section 6 of the Act was enacted merely for the purpose of administrative convenience and it could not affect the status of a police officer. He then pointed out that the Act itself contemplated appointments of the various officers who would not be under the control of Inspector General of Police but under the control of the State Government. In this connection he drew our attention to Sections 7 and 8-A of the Act. He also referred to Section 6 (2)(b) of the Act which in his submission enabled the State Government to confer the powers of Inspector General of Police on the Additional Inspector-General of Police or Deputy Inspector-General of Police. He then relied upon the terms of the impugned resolution dated September 30, 1963 and pointed out that the object of this resolution was to set up Anti-Corruption

tion unit under the direct control of the Government for the purpose of strengthening the organization and streamlining the machinery for better and more effective handling of Anti-Corruption work. This in his submission pertains to organisation of the police force within the power of the State Government and does not amount to creation of a separate police force as urged by Mr. Shethna.

8. Before we come to these respective contentions it would be necessary to set out the relevant provisions of the Act. Section 2 (11) defines 'police officer' and reads:

"2 (11). Police officer means any member of the police force appointed or deemed to be appointed under this Act, and includes a special or an additional police officer appointed under Section 21 or 22." Sections 3, 4, 5, 6, 7 (a), 7 (c) and 8 (a) of the Act read as under :

"3. There shall be one police force for the whole of the State of Gujarat, provided that the members of the police forces constituted under any of the Acts mentioned in Schedule I, immediately before the coming into force of this Act in the relevant part of the State shall be deemed to be the members of the said police force."

4. The superintendence of Police force throughout the State of Gujarat vests in and is exercisable by the State Government and any control, direction or supervision exercisable by any officer over any member of the police force shall be exercisable subject to such superintendence.

5. Subject to the provisions of this Act:

(a) the police force shall consist of such number in the several ranks and have such organization and such powers, functions and duties as the State Government may by general or special order determine,

(b) the recruitment, pay, allowances and all other conditions of service of the police force shall be such as may from time to time be determined by the State Government by general or special order :

Provided that (i) the rules and orders governing the recruitment, pay, allowances and other conditions of service of the members of the police force constituted under any of the Acts mentioned in Part I or II of Schedule I and deemed to be the members of the police force under Section 3, shall continue in force until altered or cancelled under clause (b); but in the case of members of the police force constituted under any of the Acts mentioned in Part II of that Schedule such alteration or cancellation shall be subject to the proviso to sub-section (7) of Sec. 115 of the States Reorganization Act, 1956, (ii) nothing in this clause shall apply to the recruitment, pay, allowances and other conditions of service of the members of the Indian Police and Indian Police Service"

6. (1) "For the direction and supervision of the police force, the State Government

shall appoint an Inspector General of Police who shall exercise such powers and perform such functions and duties and shall have such responsibilities and such authority as may be provided by or under this Act or orders made by the State Government.

(2) (a) The State Government may appoint an Additional Inspector General and one or more Deputy Inspectors General of Police.

(b) The State Government may direct that any of the powers, functions, duties and responsibilities and the authority of the Inspector General of Police may be exercised, performed or discharged as the case may be, by the Additional Inspector General or a Deputy Inspector General.

(c) The State Government may also by a general or special order direct that the Additional Inspector General or Deputy Inspector General shall assist and aid the Inspector General in the performance, exercise and discharge of his powers, functions, duties, responsibilities and authority in such manner and to such extent as may be specified in the order."

7 (a) "The State Government may appoint a Police officer to be the Commissioner of Police for any area specified in a notification issued by the State Government in this behalf and published in the Official Gazette."

7 (c) "The Commissioner shall exercise such powers, perform such functions and duties and shall have such responsibilities and authority as are provided by or under this Act or as may otherwise be directed by the State Government by a general or special order :

Provided that the State Government may direct that any of the powers, functions, duties, responsibilities or authority exercisable or to be performed or discharged by the Commissioner shall be exercised, performed or discharged subject to the control of the Inspector General:

Provided further that the area for which a Commissioner has been appointed under this section shall not, unless otherwise provided by or under this Act, be under the charge of the District Magistrate or the District Superintendent for any of the purposes of this Act, notwithstanding the fact that such area forms part of a district within the territorial jurisdiction for which a District Magistrate or a District Superintendent may have been appointed."

8 (a) "The State Government may appoint for the whole of the State of Gujarat or for any part thereof one or more Superintendents of Police as it may think fit;

(1) for the Police Wireless System.

(2) for the Police Motor Transport system, or

(3) for the performance of such specific duties as the State Government may

from time to time determine in this behalf, and the Superintendent so appointed shall exercise such powers and perform such functions as the State Government may from time to time assign to him:

Provided that such powers and functions shall be exercised or performed subject to the control of the Inspector-General."

9. Now the material point for our decision is whether the persons who submitted charge-sheet before the two learned Special Judges in these two cases, were police officers or not and for that purpose, the definition of that term as contained in Section 2 (11) is very relevant. According to the definition, police officer would mean any member of the police force appointed or deemed to be appointed under the Act. It would also include a special or an additional police officer appointed under Sections 21 and 22. In defining the term 'police officer' the Legislature has not indicated that the police officer should not only be appointed or deemed to have been appointed under the Act but should also be under the control of the Inspector General of Police. The word has reference to the status of the officer and for that purpose all that is to be seen is whether he is a member of the police force appointed under the Act. Now it is not the case of the petitioners that the officers who investigated these cases were not appointed as members of the police force under the Act. Therefore, it seems that in order to show that these two persons are not police officers, Mr. Shethna has to rely upon a long line of reasoning in order to bring us to the conclusion that the persons working as officers in the Anti-Corruption Bureau cannot be said to be police officers. For this purpose Mr. Shethna starts with the provisions of Section 6 (1) of the Act and in his submission any police officer belonging to the single police force in the State Government must necessarily be under the direction and supervision of the Inspector General of Police. In dealing with this submission we have to take notice of the significant difference between the provisions of Sections 4 and 6 (1) of the Act. Section 4 in express terms states that the power of superintendence of the police force throughout the State of Gujarat vests in and is exercisable by the State Government. As against this there is no express enactment in Section 6 similarly worded viz., that the power of direction and supervision of the police force in the State of Gujarat vests in the Inspector General of Police. Therefore, the contention of Mr. Shethna that Section 6 (1) in express terms confers power of direction and supervision of the police force on the Inspector General of Police cannot be accepted. It is also not possible to imply by way of necessary implication that this power of direction and supervision is vested exclusively in the Inspector General of Police. The provision

of sub-section (2) (b) of Section 6 of the Act in itself shows that no such power can vest exclusively in the Inspector General of Police under the enactment in question because the powers, functions, duties and responsibilities and the authority of the Inspector General of Police can also be conferred upon the Additional Inspector General of Police or Deputy Inspector General of Police. If we read Section 6 (1) as it is, it is clear that the first part of that section reading "for the direction and supervision of the Police Force, the State Government shall appoint an Inspector General of Police" only shows the object of the creation of the post of the Inspector General of Police. It is true that this post is a statutory post but in creating it, the legislature has merely specified the object of creation of that post. So far as the powers exercisable by the incumbent of that post are concerned, the latter part of Section 6 (1) in itself makes the position clear viz., that the incumbent can exercise powers as may be provided by or under the Act or as may be directed by orders made by the State Government. The word 'such' with reference to exercise of powers by the Inspector General of Police as contained in Section 6 (1) of the Act is also significant. So far as the powers exercisable by the Inspector General of Police under the Act are concerned, they may be found in Sections 16, 20, 23, 24, 25, 28 and 29 of the Act. Section 6 (1) enables the State Government to confer such other powers on the Inspector General of Police as may be directed by orders made by the State Government. Therefore, for the purpose of direction and supervision of the police force, the legislature enabled the State Government to confer powers upon the Inspector General of Police and that in itself would indicate that the first part of Section 6 (1) does not amount to conferment of absolute powers of direction and supervision on the Inspector General of Police in express terms or by necessary implication. Now the resolution in question deals with the control over the Anti-Corruption Bureau and vests that control in the Home Department. Section 6 (1) of the Act does not lay down that all the police officers belonging to the single police force in the State shall be under the control of the Inspector General of Police. There is indication in the Act itself to the contrary. Thus when we read Section 7 (a) and the first proviso of Section 7 (c) of the Act, it becomes clear that the State Government can appoint a police officer to be the Commissioner of Police and confer upon him such powers, functions and responsibilities and make him subject to such duties as may be directed by the State Government by a general or special order. Then the first proviso lays down that the State Government may direct that any of the powers, functions, duties, responsibilities or authority exercisable or to be performed or dis-

charged by the Commissioner of police shall be exercised, performed or discharged subject to the control of the Inspector General of Police. We find another instance in Section 8 of the Act which provides for the appointment by the State Government for the whole of the State or for any part thereof one or more Superintendents of Police either for the Police Wireless system or for the Police Motor Transport system or for the performance of such specific duties as the State Government may from time to time determine in this behalf. That section also provides that the Superintendents so appointed shall exercise such powers and perform such functions as the State Government may from time to time assign to them. Then the proviso states that such powers and such functions shall be exercised or performed subject to the control of the Inspector General of Police. Thus in case of the appointment of the Police Commissioner the powers conferred upon him may be exercised subject to the control of the Inspector General of Police, if the State Government so directs. This would show that in the absence of such a direction the Police Commissioner is not subject to the control of Inspector General of Police which exercising the powers conferred upon him and performing duties. The proviso to Section 8 (a) in itself shows that whenever exercise of powers by a particular police officer was intended to be made subject to the control of the Inspector General, specific provision was made in the section. We may turn to the latter part of Section 4 of the Act which says that any control, direction or supervision exercisable by any officer over any member of the police force shall be exercisable subject to such superintendence of the State Government. When we read these different provisions, one thing becomes clear and it is this. It is not that the legislature provided that the Inspector General of Police had the overall power of direction and supervision over the police force and that this power was so sacrosanct that it could not be touched by the State Government even though the power of superintendence of the police force throughout the State was expressly vested in the State Government. The word 'superintendence' would also take in the control over the police force. There is other indication in the Act itself which would show that what is material is the ultimate superintendence of the State Government over the police force. The Act itself contemplates existence of two distinct superior police officers exercising within their respective jurisdiction the powers of direction and supervision conferred upon them under the Act, and for that purpose we may reproduce Sections 23 and 24 of the Act.

23. "Subject to the orders of the State Government the Commissioner in the case of the police force allocated to areas for

which he has been appointed and the Inspector General in the case of the police force allocated to other areas may make rules or orders not inconsistent with this Act or with any other enactment for the time being in force,

(a) regulating the inspection of Police Force by his subordinates;

(b) determining the description and quantity of arms, accoutrements, clothing and other necessities to be furnished to the police;

(c) prescribing the places of residence of members of the police force;

(d) for institution, management and regulation of any police fund for any purpose connected with police administration;

(e) regulating, subject to the provisions of Section 17, the distribution, movements and location of the police,

(f) assigning duties to police officers of all ranks and grades, and prescribing:

(i) the manner in which, and

(ii) the conditions subject to which, they shall exercise and perform their respective powers and duties;

(g) regulating the collection and communication by the police of intelligence and information;

(h) generally, for the purpose of rendering the police efficient and preventing abuse or neglect of their duties."

"24. (1) The Inspector General may, subject to the rules and orders of the State Government, call for such returns, reports and statements on subject connected with the suppression of crime, the maintenance of order and the performance of their duties as his subordinates may be able to furnish to him. The Inspector General shall communicate to the District Magistrate and the Revenue Commissioner any general orders issued by him for the purposes aforesaid as in consequence of the information furnished to him, and also any orders which the State Government may direct.

(2) The Commissioner may subject as aforesaid with reference to the area under his charge call for such reports, returns and statements as are provided for in subsection (1)."

According to Section 23 the Commissioner of Police is given powers to make rules or orders in respect of matters specified in that section, in case of police force allocated to areas for which he has been appointed. The same rule-making power is conferred upon the Inspector General of Police in respect of these matters, "in the case of police force allocated to other areas," the words 'other areas' are very important in this connection. They will show that for the area for which the Commissioner has been appointed he has the power to make rules or orders not inconsistent with the Act or with any other enactment for the time being in force, with regard to the matters specified in Section 23 and in res-

pect of police force allocated to other areas, that power is conferred upon the Inspector General of Police. Similarly Section 24 (1) confers powers upon the Inspector General to call for the returns, reports etc., and sub-section (2) of Section 24 confers the same powers on the Commissioner of Police with reference to the areas under his charge. The exercise of these powers is also subject to the rules and orders of the State Government. These two sections would, therefore, show that in single police force the law contemplated two distinct authorities and conferred upon them the rule-making power with regard to the police force within their respective jurisdiction in respect of matters specified in Section 23 and conferred power to call for returns etc., in respect of these areas, under Section 24. This provision would, therefore, show that the power of direction and supervision over the entire police force in the State is not only not conferred in express terms by Section 6 but the legislature had provided for contingencies in which the Police Commissioner may act independently from the Inspector General of Police in respect of the powers conferred upon him under Sections 23 and 24 of the Act. So far as the ultimate control of the State Government is concerned, these powers of making rules or orders conferred by Section 23 and the power of calling for returns etc., are subject to the orders of the State Government. Then we may reproduce Sections 25 (1), 25 (2) (a), 25 (c) of the Act.

25 (1). "The State Government or any officer authorised by sub-section (2) in that behalf may suspend, reduce, dismiss or remove an Inspector or any member of the subordinate ranks of the Police force whom he shall think cruel, perverse, remiss or negligent in the discharge of his duty or unfit for the same and may fine to an amount not exceeding one month's pay, any member of the subordinate ranks of the police force, who is guilty of any breach of discipline or misconduct or any act rendering him unfit for the discharge of his duty, which does not require his suspension or dismissal."

25 (2) (a) "The Inspector-General, the Commissioner and the Deputy Inspector-General shall have authority to punish an Inspector or any member of the subordinate ranks under sub-section (1). A District Superintendent shall have the like authority in respect of any Police officer subordinate to him below the grade of Inspector and may suspend an Inspector who is subordinate to him pending inquiry into a complaint against such Inspector and until an order of the Inspector-General or Deputy Inspector-General can be obtained."

25 (c) "The exercise of any power conferred by this sub-section shall be subject always to such rules and orders as may be made by the State Government in that behalf."

These provisions deal with a power of considerable magnitude inasmuch as they provide for suspension, reduction, dismissal or removal of an Inspector of Police or any member of subordinate ranks of the police force. Sub-section (1) confers these powers on the State Government in the first instance. Sub-section (2) (a) provides that the Inspector-General, the Commissioner and the Deputy Inspector-General shall have authority to punish a police officer or any member of the subordinate rank under sub-section (1). Now the exercise of this authority or power to punish conferred upon the Inspector General of Police by sub-section (2) (a) is also made subject to such rules and orders as may be made by the State Government in that behalf. Therefore, so far as the control over the police force in the State is concerned, there is nothing in Section 6 of the Act to show that that control vests exclusively in the Inspector General of Police. If we bear in mind the various provisions of the Act then it becomes clear that the first part of Section 6 only sets out the object for appointment of an Inspector General of Police and that object is direction and supervision of the police force. But so far as the powers enabling the carrying out of that object are concerned, they must either be found in other provisions of the Act or in the orders made by the State Government. It is in this context that we must now turn to Section 5 (a) of the Act which confers powers upon the State Government the power to determine the ranks and the power of organization of the police force as well as the authority to determine the powers, functions and duties which may have to be exercised by members of the police force. It is pursuant to this power of organization that the State Government appears to have made the resolution dated September 30, 1963. This resolution reads as under:

"Anti-Corruption
Bureau, Establishment of—
Government of Gujarat,

Home and Civil Supplies Department,
Resolution No ACB 3263/B,
Sachivalaya, Ahmedabad.

Dated the 30th September, 1963.
Resolution:

The Anti-Corruption work in the State forms part of the responsibilities of the Inspector General of Police and is looked after by him with the assistance of an Assistant Inspector General of Police. With a view to strengthening this organization and streamlining this machinery for better and more effective handling of Anti-Corruption work, Government has decided to set up a separate Anti-Corruption Bureau under the direct control of Government in the Home Department for work in connection with the collection of intelligence and investigation of cases of bribery and corruption, embezzlement of Government money and other malpractices and making en-

quiries into complaints made by members of the Public or Government officials relating to such matters. Government is pleased to direct that the following posts should be created, for a period of 11 (months up to) the 30th September, 1964 in the first instance to man the Anti-Corruption Bureau:

1. One post of Director, Anti-Corruption Bureau in the rank of Deputy Inspector General of Police.

2. One Armed Head Constable.

3. Two Armed Constables.

4. Three posts of Peons in the usual scale of pay.

The post of Director, Anti-Corruption Bureau, is created by virtue of powers vested in the State Government under Rule 4 (2) of the Indian Police Service (Cadre) Rules 1954, and should be treated as a temporary addition to the I. P. S. Cadre of the State. In addition, the following posts existing in the office of the I. G. P., G. S. Ahmedabad for work pertaining to Anti-Corruption in the respective pay scales should be deemed to be transferred to the new Anti-Corruption Bureau with effect from the date the Bureau starts functioning.—

1. 1 Dy. S. P.

2. 1 Reader P. I.

3. 1 Head Clerk

4. 1 Stenographer.

5. 2 Senior Clerks.

6. 4 Junior Clerks.

The two existing regional units of the Anti-Corruption organizations one at Ahmedabad and the other at Rajkot with their existing staff will continue to exist under the new scheme and should be deemed to have been transferred to the new Bureau.

Due to the separation of function of Anti-Corruption from the office of the Inspector General of Police there will be considerable reduction in the work of the A. I. G. P. in the office of the I. G. P. Government is, therefore, pleased to direct that the post of officer on Special Duty in the office of the I. G. P., G. S., Ahmedabad, should be abolished with effect from the date the new Bureau comes into effect and the work in the Inspector General of Police's office should be redistributed among the A. I. G. P. and the A. O.

The Budget provisions made for Anti-Corruption work in the office of the Inspector General of Police should also be deemed to have been transferred to the new Bureau from the date the new Bureau comes into being.

By order and in the name of the Government of Gujarat.

P. P. SINGALA.

Deputy Secretary to the Government of Gujarat, Home and Civil Supplies Department.

There is nothing in this resolution to suggest that the State Government had taken upon itself the task of creating

another police force. The resolution in itself shows that the Anti-Corruption work in the State formed part of the responsibilities of the Inspector General of Police and was looked after by him with the assistance of an Assistant Inspector General of Police before the resolution. Then the resolution refers to the decision of the Government to set up a separate Anti-Corruption Bureau under the direct control of the Government in the Home Department with a view to strengthen the Anti-Corruption Organization and streamline that machinery for better and more effective handling of Anti-Corruption work. The constitution of this separate unit under the direct control of the Home Department is consistent with Sections 4 and 5 (a) of the Act. The resolution in question nowhere shows that the State Government intended to create a separate or a second police force in the form of Anti-Corruption Bureau for the State of Gujarat. The grievance of Mr. Shethna arises from the fact that this Bureau is placed under the direct control of the Home Department. We see nothing objectionable in that case. If this unit was formerly under the indirect control of the State Government, there is nothing in law prohibiting the State Government to bring the unit under its direct control pursuant to the express power to organise the police force conferred upon it under Section 5 (a) of the Act. This only means that so far as Anti-Corruption work is concerned, the State Government instead of acting through an agency of the Inspector General of Police, has decided to act directly.

10. Now it is true that the power of organization and determination of ranks and number, conferred upon the State Government under Section 5 (a) is subject to the provisions of the Act but there is no provision contained in this Act to show that the State Government cannot bring a section of police force for a specific purpose, within its direct control from the indirect control that it exercises through the Inspector General of Police and Police Commissioner.

11. For the purpose of construing Section 6 (1) of the Act, Mr. Shethna urged before us that we may put a 'full stop' after Inspector General of Police in the first part of Section 6 (1) and we may substitute the pronoun 'he' instead of 'who' in the beginning of the second part. When so read Section 6 (1) will read as under:

"For the direction and supervision of police force, the State Government shall appoint an Inspector General of Police. He shall exercise such powers and perform such functions and duties and shall have such responsibilities and such authority as may be provided by or under this Act or orders made by the State Government"

In Mr. Shethna's submission if these two parts are read separately then the first part would confer the power of direction and supervision on the Inspector General of

Police and second part would refer to the conferment of such other powers upon the Inspector General of Police as may be provided by orders made by the State Government. In our opinion, in reading Section 6 (1) as submitted by Mr. Shethna makes no difference. In that case also the first part will only show the object of the appointment of the I. G. of Police and the second part will refer to the powers pertaining to direction and supervision which may be conferred upon him by the State Government or which are already conferred upon him under the statute. This construction of Section 6 (1) will, therefore, not be helpful to Mr. Shethna. Mr. Shethna also referred to Bombay Police Punishment and Appeal Rules and the provisions contained therein and urged that the power to hear appeals and the power to transfer inquiries as well as the power to revise the orders of subordinate officers in these matters were taken away by the impugned resolution as the Anti-Corruption Bureau was made an independent unit. In our opinion, this argument has no relevance to the question which we are called upon to answer and we must not lose sight of that question viz., whether the investigating officers who submitted charge-sheets in these two cases can be said to be police officers or not. Besides, the exercise of the power of punishment conferred upon the Inspector General of Police under Section 25 (2) (a) of the Act is made subject to the rules and orders which the State Government may make in this behalf as can be seen from Section 25 (2) (c). And the Punishment and Appeal Rules are made by the State Government under this enabling provision. Therefore, the various powers under these rules to which reference was made by Mr. Shethna have been derived by the Inspector General of Police from the State Government. Then Mr. Shethna tried to point out by reading Section 551 of the Criminal Procedure Code that the power conferred upon the Inspector General of Police as a Police Officer superior in rank to an officer-in-charge of a police station was taken away by the resolution. Section 551 of the Criminal Procedure Code reads as under:

551. "Police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed as may be exercised by such officer within the limits of his station."

Now there is nothing in the impugned resolution to show that by setting up of Anti-Corruption Bureau as a separate unit, the powers of the police officer superior in rank to an officer in charge of a police station as conferred by Section 551 of the Code are in any way affected. Mr. Shethna also contended that the power to organise conferred by Section 5 (a) of the Act does not mean the power to bifurcate the police

force. That may be so, but in the present case, no bifurcation of the police force has been brought about. On that point, the resolution in itself is clear. The penultimate paragraph of the resolution shows that the separation of the function of Anti-Corruption from the office of the Inspector General of Police was brought about by the resolution in question. And this is a matter which pertains to organization of the police force. In view of these reasons, it is not possible to accept the first contention of Mr. Shethna that the impugned resolution is ultra vires the provisions of the Bombay Police Act, 1951 and that it contravenes the provisions of Section 3 thereof.

12. That brings us to the second contention of Mr. Shethna which arises in Criminal Revision Application No. 95/69 only. In this connection the contention raised in itself shows that by the appointment of Mr. Dave as Chief City Magistrate, the powers that he had as a Special Judge under the first notification dated June 20, 1966, were lost to him and therefore he had no jurisdiction to take cognizance of the offences in question unless these powers were conferred upon him after his repositing as Additional Sessions Judge Ahmedabad (Rural) at Narol. Now the notification dated November 22, 1968 has superseded the first notification dated June 20, 1966. This notification, in terms appoints Mr. D. J. Dave as Special Judge for Ahmedabad Revenue District excluding the City of Ahmedabad and Mr. S. S. Talati as Additional Special Judge for Saberkantha Revenue District. This notification is dated November 22, 1968 and on the date when Mr. Dave's jurisdiction to take cognizance was challenged by application dated November 30, 1968, Mr. Dave was already appointed as Special Judge for Ahmedabad Revenue District excluding the city of Ahmedabad. Therefore, at that point of time, it could not be said that he had no jurisdiction to take cognizance of these offences. As regards the effect of what he did in the eye of law prior to the notification dated November 22, 1968 it is not necessary for us to give any decision because this later notification in terms appoints Mr. Dave as Special Judge. The charge in this case has been framed by Mr. Dave after the date of this notification and therefore it can be said that he had taken cognizance of this case after November 22, 1968. Therefore, the second contention of Mr. Shethna also fails. In view of this notification we do not express any opinion on the point that Mr. Dave vacated his office as Special Judge on his appointment as the Chief City Magistrate, Ahmedabad.

13. That brings us to the second contention which is raised in Criminal Revision Application No. 102/69 with regard to the legality of the investigation. So far as the contention that P. S. I. Solanki was not a police officer is concerned, we have already dealt with it and according to our conclu-

sion Mr. Solanki did not cease to be a police officer when he investigated the case. Then it was urged that the learned City Magistrate who granted permission to P. S. I. Solanki to investigate the offence in question did not apply his mind to the facts of the case before granting permission under Section 5-A (1) of the Prevention of Corruption Act, which reads as under :

5-A (1). "Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), no police officer below the rank :

(a) in the case of Delhi Special Police Establishment, of an Inspector of Police,

(b) in the presidency towns of Calcutta and Madras, of an Assistant Commissioner of Police;

(c) in the presidency town of Bombay, of a Superintendent of Police; and

(d) elsewhere, of a Deputy Superintendent of Police;

shall investigate any offence punishable under Section 161, Sec. 165 or Sec. 165-A of the Indian Penal Code, 1860 (Act XLV of 1860) or under Section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be, or make arrest therefor without a warrant;

Provided further that an offence referred to in clause (e) of sub-section (1) of Section 5 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police."

The relevant portion of the application given by the P. S. I. Solanki to the City Magistrate, 11th Court, Ahmedabad as reproduced in the application given to the lower Court by the petitioner is as under :

"Our Deputy Superintendent of Police, A. C. B. Ahmedabad and Police Inspector, A. C. B. Ahmedabad are engaged in other important investigation and therefore, they will not be able to investigate this case. Therefore, it is requested that permission to investigate this case be given to me."

On this application the learned Magistrate made the following endorsement as found from the order of the learned Special Judge:

"I have examined the complainant on S. A. He is P. S. I. Shri R. M. Solanki. P. I. Shri T. D. Patel of Anti-Corruption Bureau, Ahmedabad is out of station. He has gone out of the station today. I have also seen the complaint and interrogated the complainant regarding the contents of the complaint. For the aforesaid reasons I give sanction to investigate under Sec. 5-A of the Prevention of Corruption Act, 1947

read with Section 161 of the I. P. Code to P. S. I. Shri R. M. Solanki of Anti-Corruption Bureau, Ahmedabad."

So far as the satisfaction of the learned Magistrate as regards the question that there was a prima facie case which required investigation is concerned, no grievance has been made before us by the learned Advocate for the petitioner. But the grievance is that the learned Magistrate should also have satisfied himself that this is a fit case in which investigation should be permitted to be carried out by a police officer below the rank of police officer specified in Section 5-A of the Prevention of Corruption Act, 1947. The endorsement of the learned Magistrate shows that he had satisfied himself on this point also. In fact it shows that he had examined the complainant on solemn affirmation. This complainant is P. S. I. Solanki. He has also mentioned that P. I. Shri T. D. Patel is out of station. Therefore in entrusting this investigation to a subordinate police officer the learned Magistrate has satisfied himself. But the contention raised before us is that the learned Magistrate did not inquire whether any superior police officer belonging to the general police force in the city of Ahmedabad was available for investigation. In view of this, it was urged that the learned Magistrate failed to apply his mind to the provisions of Section 5-A of the Act. A similar contention was raised in Criminal Revn. Appln. No. 270 of 1968 = (reported in AIR 1969 Guj 362), before the Division Bench consisting of my learned brothers A. D. Desai, J. and J. M. Sheth, J. In that case it was observed as under :

"The Magistrate when he considers the question of granting permission to investigate has to satisfy himself that a prima facie case exists and there are circumstances in the case which would justify him to grant a permission to an officer below the designated rank to investigate the offence of bribery. If the intention of Legislature was to restrict the power of the Magistrate in granting the sanction to investigate the offence to the availability or non-availability of officers of the designated rank, different expression would have been used by the Legislature to carry out the said intention. In our opinion the provisions of Sec. 5-A of the Act enable either an officer of the designated rank to investigate the offence of the bribery or an officer below the designated rank to do so provided he obtains the permission of the Magistrate to investigate the offence. The provisions of the section do not provide that the Magistrate shall not grant a permission to investigate the offence to an officer below the rank designated in the section because the officers designated in the section are available to investigate the crime."

The matter is thus concluded by the decision of a Division Bench with which we respectfully agree. Therefore, the conten-

tion that the learned Magistrate did not examine the question whether any other officer was available will have no bearing upon the legality of the permission granted by him. In this view the investigation in Special Case No. 15/68 cannot be said to be illegal.

14. In the result, both the applications fail. They are rejected and the rule issued in each application is discharged.

Applications rejected.

1970 CRI. L. J. 1100 (Vol. 76, C. N. 270) = AIR 1970 GUJARAT 171 (V 57 C 27)

M. U. SHAH, J.

Gulabchand Bludarbhai Soni, Petitioner v. The State of Gujarat and another, Respondents.

Criminal Revn. Appln. No. 200 of 1967, D/- 10-7-1969

(A) Penal Code (1860), Section 499, Exceptions 7 and 9 — Defamation — Protection available under Exception 8 or 9 — When can be claimed — Legal proceedings — Privilege available to party to it — Nature.

The privilege is a qualified one and not absolute. A person who deliberately makes defamatory statements without justification is not protected. To claim protection either under Exception 8 or 9 to Section 499, it is the claimant who must prove good faith (Case law discussed). (Paras 5, 6)

The requirements of "good faith" and "public good" have both to be satisfied in order to invoke Exception 9. Even when there is private communication for public good, the accused has necessarily to prove that he made it in good faith.

(Para 2)

To avail of the benefit of Exception 8 the accused must prove that the accusations were made to a person in authority over the party accused, and that the accusation was preferred in good faith. This exception does not formulate any rule of absolute privilege. (Para 3)

(B) Penal Code (1860), Section 52 — "Good faith" — Definition of — Nature.

Definition of "good faith" in Section 52 is a negative definition. It indicates that an act is said to be done in good faith when it is done with due care and attention. Indeed, it does not require logical infallibility. The plea of good faith may be negatived on the ground of recklessness indicative of want of due care and attention if the imputations in question, have been made as categorical statements of facts. (Para 3)

(C) Penal Code (1860), Section 499 — Defamation — Accused pleading good faith — Degree of proof required to sub-

stantiate that plea is as in civil proceedings — Proof beyond reasonable doubt is not necessary. (Para 3)

Cases Referred: Chronological Paras

(1967) 69 Bom LR 512 = 1967 Mah LJ 823, Miss Kamalini Manmade v. Union of India 5

(1966) AIR 1966 SC 97 (V 53) = 1966 Cri LJ 82, Harbhajan Singh v. State of Punjab 4

(1935) 1935 AC 462 = 104 LJ KB 433, Woolnington v. Director of Public Prosecutions 5

(1926) AIR 1926 Bom 141 (V 13) = 28 Bom LR 1 = 27 Cri LJ 423 (FB), Bai Shanta v. Umrao Amur Malik 3, 5

(1921) AIR 1921 Cal 1 (V 8) = ILR 48 Cal 388 = 22 Cri LJ 31 (SB), Satish Chandra Chakravarti v. Ram Dayal De 3, 5

(1917) AIR 1917 Bom 192 (V 4) = 20 Bom LR 601 = 19 Cri LJ 731, Emperor v. Esufalli Abdul Hussain 8

(1855) 5 E & B 344 = 119 ER 509, Harrisan v. Bush 2

A. M. Joshi, for Petitioner; G. T. Nana-vaty, Asstt. Govt. Pleader, for Respondent No. 1, State; N. V. Karlekar, for Respondent No. 2

ORDER: This revision application arises out of a complaint for the offence punishable under Section 500, Indian Penal Code, which was filed by the opponent No. 2 herein named Prabhudas Bhogilal Dudh-wala in the Court of the Judicial Magistrate, First Class, 7th Court, Baroda, which was registered as Criminal Case No 77 of 1966. The complainant opponent's case is that the accused, who is the applicant herein, was staying as a tenant in his house. The accused had, on September 10, 1965, made an application against the complainant before the Sub-Divisional Magistrate under Section 107 of the Code of Criminal Procedure, 1898 (5 of 1898) for taking out chapter proceedings against him. The case was registered as Chapter Case No. 632 of 1965. In that application made in Gujarati, several wild and reckless defamatory imputations were made against the complainant, with the intention to harm the reputation of the complainant. It stated, inter alia, that the present complainant Prabhudas Bhogilal, who was the landlord of the premises which the present accused Gulabchand was occupying as a tenant, with a view to obtain possession of the said premises in order to realise higher rent, was making frantic intrigues (original in Gujarati omitted) against him. The application further stated that, on the night of June 10, 1965, while the applicant therein (present accused) was sitting in his house and mending mangoes, the opponent therein (present complainant) entered his house and committed criminal trespass; that he gave wild abuses and gave a kick

on his back; that he took out a knife from his pocket; opened it, raised it at him and menacingly demanded of him the withdrawal and settlement of his application (complaint) made against the complainant accusing him of having committed murder of his son or else he would meet the same fate as did the son. After narrating the other facts relating to the incident, in the penultimate paragraph of the application, it was stated that the opponent was a rich, influential, frenzied type man and a leader of a gang of miscreants and he (present accused) had apprehension that any time he (present complainant) might cause harm to his person and property. In his examination on oath recorded below his application Ex. 15, the accused had, *inter alia*, stated that the complainant was a dangerous 'goonda'. These imputations made in the penultimate paragraph of the present accused's application and in the examination on oath below it are the defamatory imputations of which the present complainant has made grievance in his complaint in Criminal Case No. 77 of 1966 out of which this revision application arises. It may here be stated that the accused had not proceeded with his application Ex. 15, which was dismissed because of default of his appearance on the date of hearing. At the trial, the accused had pleaded protection under Exception 8 to Section 499, Indian P. C. However, he had led no evidence whatsoever to show that he had exercised good faith in making these imputations. Both the Courts below have taken the view that the said imputations are defamatory to the complainant and were made with the intention of harming or with the knowledge that they would harm the reputation of the complainant. Both the Courts have also held that the accused did not prove good faith in making the imputations and, therefore, was not entitled to the protection of Exception 8 to Section 499, Indian P. C. The learned Judicial Magistrate had convicted the accused for the offence under Section 500, Indian P. C., and sentenced him to suffer imprisonment till the rising of the Court and to pay a fine of Rs. 100, in default rigorous imprisonment for one month. The order of conviction and sentence has been upheld by the learned Additional Sessions Judge, Baroda, in Criminal Appeal No. 137 of 1966. The present revision application is directed against the said order dismissing the appeal of the accused.

2. Mr. A. M. Joshi, learned Advocate appearing on behalf of the applicant-accused, has not contested the finding of the lower Court that the imputations made were defamatory. He has, however, contested the finding that the applicant was not entitled to the protection of Exception 8 to Section 499, Indian P. C. Further, he has contended that the accused was also entitled to the benefit of Exception 9. Now, Exception 9 to Section 499 provides that

it is not defamation to make an imputation on the character of another, provided the imputation be made in good faith for the protection of the interest of the person making it, or for any other person, or for the public good. In the present case, the ingredient of public good is not available to the accused and that is not the case as urged by Mr. Joshi, whose contention was that the imputations were made for the protection of the interest of the accused who made them. This Exception relates to private communications which a person makes in good faith, for the protection of his own interests, etc. This Exception appears to be a mere reproduction of the guiding principle which was stated by Lord Campbell, C. J., in *Harrison v. Bush*, (1855) 5 E & B 344, 348, namely: "A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminations matter which, without this privilege would be slanderous and actionable." The requirements of "good faith" and "public good" have both to be satisfied. Having regard to the admitted fact that the imputations did not relate to private communications and to public good, the Exception cannot be invoked in this case. But, even when and if the Exception is available in a case, the accused has necessarily to prove that he made them "in good faith."

3. Exception 8 to Section 499 provides that "it is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation." To avail of the benefit of this Exception, the accused must prove that: (i) the accusations were made to a person in authority over the party accused, and (ii) the accusation must be preferred in good faith. This exception does not formulate, according to the decision of the Special Bench of the Calcutta High Court in *Satish Chandra Chakravarti v. Ram Dayal De*, ILR 48 Cal 388 = (AIR 1921 Cal 1 SB), which has been followed by the Full Bench of the Bombay High Court in *Bai Shanta v. Umrao Amir Malik*, 28 Bom LR 1 = (AIR 1926 Bom 141), any rule of absolute privilege. The Exception introduces a qualified privilege. The accused must, therefore, show that the accusations were preferred in good faith. The expression "good faith" has been defined in Section 52 of Indian Penal Code. It provides that "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." This is a negative definition, but it indicates that an act is said to be done in good faith when it is done with due care and attention. Indeed, it does not require logical infallibility. The plea of good faith

may be negated on the ground of recklessness indicative of want of due care and attention if the imputations in question, as in the instant case, have been made as categorical statements of facts. Apart from that, there is no doubt that the accused must substantiate his plea of good faith to be entitled to the protection of the Exception. Of course, the degree of proof that is to be offered by the accused for the purpose is not the same as is expected of the prosecution which is required to prove its case, beyond reasonable doubt, but is as in civil proceedings. In *Harbhajan Singh v. State of Punjab*, AIR 1968 SC 97, Gajendragadkar, C. J., speaking for the Court has in this connection observed at p. 101 :

"there is consensus of judicial opinion in favour of the view that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds "in proving a preponderance of probability." As soon as the preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus. It must be remembered that basically, the original onus never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt. . . ."

The observations further at p. 102 of the report are .

"It will be recalled that it was with a view to emphasizing the fundamental doctrine of criminal law that the onus to prove its case lies on the prosecution, that Viscount Sankey in *Woolmington v. Director of Public Prosecutions*, 1935 AC 462, observed that "no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." This principle of common law is a part of the criminal law in this country. That is not to say that if an Exception is pleaded by an accused person, he is not required to justify his plea, but the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case."

4. Now, examining the case before me in that light, it must be remembered that

the imputations referred to earlier have been held to be defamatory and the finding is not in challenge before me. It was, therefore, for the accused to have discharged the onus which lay on him to show that he acted in good faith. But here, the accused has led no evidence and made out no circumstance which would show that he had so acted in good faith in preferring the wild and reckless accusations aforesaid to be found in the application Ex. 15. He has not shown that such imputations were called for in his application for security proceedings. Again, in answer to the questions put to him by the learned Judicial Magistrate in the case under Section 348 of the Code of Criminal Procedure, the accused has gone to the extent of even denying that he made an application as Ex. 15 and that he made the reckless imputations which are found in Ex. 15. In this situation, it must be held that the accused has failed to prove "good faith" and the failure would exclude the application of Exception 8 and even of Exception 9 assuming it can be invoked in the case.

5. I must say that Mr. Joshi had contended before me that there was an absolute privilege of the parties to the judicial proceedings. Mr. Joshi has for the purpose relied upon the following observations of Tulzapurkar J. Sitting as a Single Judge in the matter of *Miss Kamalini Manmade v. Union of India*, (1967) 69 Bom LR 512, he remarks at p. 526:

"Having regard to the aforesaid discussion of the several authorities, it is clear to me that the English common law Rule pertaining to absolute privilege enjoyed by Judges, Advocates, Attorneys, witnesses and parties in regard to words spoken or uttered during the course of a judicial proceeding is applicable in India . . ."

But, it has to be remembered that Tulzapurkar, J., was concerned in that case with a civil suit for damages for defamation and the learned Judge has taken pains to add the following material qualification to the passage aforesaid :

" . . . at any rate, in relation to civil suits filed for damages for libel or slander."

The decision is thus, with respect, not an authority for the view canvassed by Mr. A. M. Joshi. Again, as observed by me earlier, the Full Bench of the Bombay High Court has in 28 Bom LR 1 = (AIR 1926 Bom 141) (supra) followed the decision of the Special Bench of the Calcutta High Court in ILR 48 Cal 388 = (AIR 1921 Cal 1 SB) (supra), laying down that there is no such absolute privilege. In the said Calcutta case, which was concerned with a criminal prosecution for defamation under Section 499, Indian Penal Code, distinction between the position obtaining with regard to criminal prosecutions and the position obtaining with regard to civil actions has been clarified as under: at p. 425 (of ILR) = (at pp. 14, 15 of AIR) of the report:

"Our conclusions then may be summarized as follows :

(i) If a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined by reference to the provisions of Section 499, Indian P. C. Under the Letters Patent, the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise. The Court cannot engraft thereupon exceptions derived from the Common Law of England or based on grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in Section 499, Indian P. C.

(ii) If a party to a judicial proceeding is sued in a civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England...."

The aforesaid observations having been followed by the Full Bench of the Bombay High Court in 28 Bom LR 1 = (AIR 1926 Bom 141) (supra), are binding upon me, apart from the fact that I am in respectful agreement with the said observations. Tested in the light of the first rule, it is plain that the question of good faith is material and as the aforesaid imputations which are not absolutely privileged are not shown to have been made in good faith, the accused must be held to be not entitled to the benefit of Exception 8.

6. I must say that Mr. A. M. Joshi had relied upon the decision of a Division Bench of the Bombay High Court in *Emperor v. Esufalli Abdul Hussein*, 20 Bom LR 601 = (AIR 1917 Bom 192). In that case, whilst an application and a counter application to prevent breach of the peace were being investigated into by the police, the accused called the complainant a 'rogue'. It appeared that some four months previously, the complainant was convicted and fined at the instance of the accused. The accused having been convicted of defamation, it was held that the accused was protected by Exception 9 inasmuch as the statement was made apparently for the protection of his own interests and when his application was under investigation by the police, and that the statement was made by him in good faith, Kemp, J., who was a party to the said judgment with Shah, J., had, in his judgment, agreeing with the reasoning of Shah, J., therein observed at p. 603 (of Bom LR) = (at p. 193 of AIR) :

"I think that the fact that the statement, otherwise defamatory, was made in good faith, is corroborated by the fact that the complainant in the present case had been convicted and fined for insult to the accused. I also think accused's remark about him was made in the protection of his own interests."

The decision has no applicability in the instant case. It is true that public policy requires that a party preferring a legal proceeding shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for a libel. But, the privilege is a qualified one and not absolute. A person who deliberately makes defamatory statements without justification is not protected.

7. For the aforesaid reasons, the contentions raised by Mr. A. M. Joshi have no merit and are rejected. In the result, the revision application fails and the rule is discharged.

Rule discharged.

1970 ORI. L. J. 1103 (Vol. 76, C. N. 274) =
AIR 1970 KERALA 191 (V 57 C 29)

M. U. ISAAC, J.

M. V. Ramankutty, Petitioner v. State, Respondent.

Criminal Misc. Petn. No. 502 of 1969, D/- 5-9-1969, from Order of Sub Magistrate's Court, I Kozhikode in Crl. M. P. No. 38 of 1969.

(A) Criminal P. C. (1898), Sec. 523 — Seized by the police — Section is applicable to all cases of seizure of property by police—AIR 1952 All 470, Dissented from.

Section 523, Criminal P. C. applies to all cases of seizure of property by the Police, and it empowers the Magistrate to deal with it before there is any enquiry or trial. AIR 1952 All 470, Dissented from. AIR 1958 Madh Pra 39 and AIR 1967 Cal 421 and AIR 1967 Guj 126, Rel. on.

(Para 5)
On a plain reading of the provision of Section 523 it is obvious that it applies not only to property seized by Police under Section 51, Criminal P. C. or on the allegation or under suspicion that it is stolen, but also to property seized on being found under circumstances which create suspicion of the commission of any offence. Property seized by the Police in the course of investigation of crimes falls under the latter class.

(Para 4)
(B) Criminal P. C. (1898), Section 523 — Exercise of jurisdiction under — Police report about seizure is not condition precedent.

The Magistrate is not powerless to act under Section 523, Criminal P. C. until a police report regarding the seizure of the

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property is received by him. The view that the Magistrate has no jurisdiction under the section before the property is produced in Court is unwarranted by the Section.

(Para 6)

It would be perfectly open to the Magistrate to take note of the fact about seizure by the police officer and while he may not act upon it at once, it would be his duty to inquire from the police officer and have his report obtained if the police officer so desires to send. If however, the police officer does not choose to send in spite of the intimation sent to him, the party claiming the property cannot be made helpless having no remedy by reason of the fault or default on the part of a police officer in making a report which he was bound to make forthwith on seizing the property under Section 523 (a). AIR 1967 Guj 126, Rel. on.

(Para 6)

(C) Criminal P. C. (1898), Section 523 — Power of police to release property — Effect of Section on exercise of power — AIR 1967 Guj 126, Partly dissented from.

Section 523 does not prevent the Police from releasing a property to the person from whom it was seized, if they find in the course of investigation that the seizure was unjustified; but when once the Court is moved under Section 523, Criminal P. C. the Police must hold the property subject to the orders of the Court. AIR 1967 Guj 126, Partly Dissented from.

(Para 6)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 Cal 421 (V 54) = 1967 Cri LJ 1003, Ajay Raj Singh v. Raj Bahadur Singh		5
(1967) AIR 1967 Guj 126 (V 54) = 1967 Cri LJ 767, Suraj Mohan v. State of Gujarat		5, 6
(1958) AIR 1958 Madh Pra 39 (V 45) = 1958 Cri LJ 187, Ganesh Lal v S N. Tiwari		5
(1953) AIR 1953 Madh Bha 241 (V 40) = 1953 Cri LJ 1704, Ram Lal Hazarimal v Hiralal Ram Lal		7
(1952) AIR 1952 All 470 (V 39) = 1952 Cri LJ 856, Purushottam Das Banarsidas v State		4

K. Kunhirama Menon and P. Ramakrishnan Nair, for Petitioner; State Prosecutor, for Respondent

ORDER: This is a petition under Section 439 of the Code of Criminal Procedure, (wrongly filed as Cr M. P.) to revise an order of the Sub-Magistrate I, Kozhikode in C. M. P. No 38 of 1969. That petition was filed for release of a motor car K.L.D 8488, which was seized by the Police in the course of investigation of a crime. The petitioner is the registered owner of the car, and it was seized on the ground that it really belonged to the accused, who purchased it with Government money alleged to have been misappropriated by him. The petition was rejected by

the Magistrate stating that the police had not produced the car in Court, and that the question of releasing the car would arise only if and when the car was produced in Court.

2. It is not disputed that the seizure of the car was reported to the Court as required by Section 523, Criminal P. C., but the petition was mainly resisted by the police, stating that it was required for the purpose of investigation, and that the Revenue Divisional Officer, had also passed an order directing the police to produce it before him. The order of the learned Magistrate was attacked before me as illegal and amounting to refusal to exercise the jurisdiction under Section 523, Criminal P. C. The learned State Prosecutor sought to support the order on the ground stated by the Magistrate, and he also submitted that the above Section has no application to the case. According to him, this section applies only at the culmination of an action taken by the Police without the accused being charged for any offence.

3. The question raised in the case relates to the scope and applicability of Section 523, Criminal P. C.; and it is of considerable importance. There is some judicial controversy in the matter, and it, therefore, requires examination. Chapter XLIII in the Code of Criminal Procedure deals with disposal of property by a Court. Section 516A, Criminal P. C., relates to property regarding which an offence appears to have been committed or which appears to have been used for the commission of an offence, and produced before any Criminal Court during any enquiry or trial, and it empowers the Court to make such order as it thinks fit for the proper custody of the said property pending the conclusion of the enquiry or trial. Section 517 relates to property concerned in any enquiry or trial, and it empowers the Court to make such orders as it thinks fit for the disposal of the said property. There is no controversy regarding the application of the above provisions. Section 523 reads as follows:—

“523. Procedure by police upon seizure of property taken under Section 51 or stolen :

(1) The seizure by any police officer of property taken under Section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if

any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

4. On a plain reading of the above provision, it is obvious that it applies not only to property seized by Police under Section 51, Criminal P. C. or on the allegation or under suspicion that it is stolen, but also to property seized on being found under circumstances which create suspicion of the commission of any offence. Property seized by the Police in the course of investigation of crimes falls under the latter class. A different view was taken by the Allahabad High Court in *Purushottam Das Banarsidas v. State*, AIR 1952 All 470. In that case the learned Judge took the view that Section 523 applied only to property seized by the police under Section 51 or Section 550, Criminal P. C. He further held that it was for the police, who had seized the property under Section 165, Criminal P. C. to dispose of it on their own responsibility; and that a Magistrate was not concerned with the disposal of a property, which was not produced before him or whose seizure was not reported to him.

5. The Madhya Pradesh High Court in *Ganesh Lal v. S. N. Tiwari*, AIR 1958 Madh Pra 39, dissented from the above view, and held that Section 523, Criminal P. C. applied to property seized by the Police under Section 165. A Division Bench of the Calcutta High Court in *Ajoy Raj Singh v. Raj Bahadur Singh*, AIR 1967 Cal 421, also dissented from the Allahabad decision. The learned Judge stated:

"Section 516-A of the Code empowers the Magistrate to deal with seized property during any inquiry or trial. Section 517 of the Code empowers the Magistrate to deal with the seized property after an enquiry or trial is concluded. Section 523 of the Code empowers the Magistrate to deal with the seized property in all other cases. Dealing with the object of the provision contained in Section 523, Criminal P. C. the Court said:

"The police while making an investigation have power to arrest an accused and to make a seizure. But the Code provides for the production of the accused before the Magistrate within 24 hours and the Magistrate has been given powers to grant bail. Similarly, the Code provides that the police must report the seizure to the Magistrate and the Magistrate has been given power to deal with such seizure. If the Magistrate is deprived of this power the police will be left with arbitrary powers to deal with the seized property during investigation, may be to the detriment of

the interest of the person entitled to the possession thereof."

The above decision has considered the arguments which found favour with the Allahabad High Court; and after referring to a number of decisions of other High Courts, it pointed out that the trend of recent decisions is that Section 523 (1), Criminal P. C. is a general provision applicable to all cases, before there is any enquiry or trial. The Gujarat High Court has also taken the same view in *Suraj Mohan v. State of Gujarat*, AIR 1967 Guj 126. I respectfully agree with this view, and hold that Section 523, Criminal P. C. applies to all cases of seizure of property by the Police, and it empowers the Magistrate to deal with it before there is any enquiry or trial.

6. The next question for consideration is whether the Magistrate has got jurisdiction to pass any order under Section 523, Criminal P. C. regarding property seized by the Police, before its seizure is reported to him, or it is produced in Court. The learned Magistrate has, in the instant case, held that he has no jurisdiction to do so before the property is produced in Court. This view is unwarranted by the Section; and it is clearly wrong. There is an elaborate and instructive discussion by Shelat J. in AIR 1967 Guj 126, on the question whether a police report is a condition precedent to the exercise of the jurisdiction under Sec. 523. In the above case, an application under Section 523 for return of a motor truck seized by the Police under Section 165, Criminal P. C. was rejected by the Magistrate on the ground that he had not received any police report about its seizure. The order of the Magistrate was sought to be supported in revision on same ground. Dealing with the obligation of the Police to report forthwith to the Magistrate regarding the seizure of any property, the learned Judge stated:

"These words have a two-fold significance. The first is that the provision gives a clear direction to the police making it obligatory to report the seizure of any such property to the Magistrate. The second direction is that it shall be reported forthwith. The use of the word 'forthwith' is something more forceful than immediately or soon after the seizure of the property. It contemplates no loss of time. The idea behind it appears to be that no inconvenience or hardship should be caused to any bona fide owner of any such property, and the matter can immediately be considered by the Magistrate having jurisdiction to deal with any such matter. No discretion is allowed to the police in that respect as would justify him to delay in making any such report and if the police required the same for the purpose of any investigation it has got to move the Magistrate for the same. At any rate, the fact about its seizure has to be reported forthwith to the Magistrate. That in a way,

serves as a check on the police in dealing with any such property seized from any person. The police is thus bound to send a report there and then as it were, 'about any such seizure to the Magistrate, as required under Section 523 (1) of the Code.' The contention that the Magistrate has no jurisdiction to act under Section 523, Criminal P. C. until a police report regarding the seizure of the property is received by him, was rejected by the Court, and in doing so, the learned Judge said:

"In my opinion, it would be perfectly open to the learned Magistrate to take note of the fact about any such truck having been seized by the police officer and while he may not act upon it at once, it would be his duty to inquire from the police officer and have his report obtained if the police officer so desires to send. It is possible that the police officer may have forgotten to send such a report, and on an intimation from the Magistrate on any such information received from the owner of the property involved, the police officer may send a report, and the Magistrate would then be justified in passing the order as he thinks fit with regard to the disposal of any such property or the delivery of such property to the person entitled to the possession thereof under Sec. 523 of the Code. If, however, the police officer does not choose to send in spite of the intimation sent to him, the party claiming the property cannot be made helpless having no remedy by reason of the fault or default on the part of a police officer in making a report which he was bound to make forthwith on seizing the property under Section 523 (1), of the Criminal Procedure Code. If the Magistrate was powerless to do so, as is sought to be urged, it may well happen that the police would retain it till at any rate the charge-sheet happens to be sent in that particular case to the Court of the Magistrate, and thereby cause considerable hardship to the rightful claimant, and even the property would suffer damage by remaining unused for any indefinite time. The police officer has no power or authority to deal with it in any manner and it is therefore that the legislature required him to report to the Magistrate, so that suitable orders can be passed by the Magistrate under Section 523 (1) of the Code."

The learned Judge set aside the Order of the Magistrate, and directed him to proceed with the application for the return of the property and dispose of the same as required by Section 523, Criminal P. C., even in the absence of any police report regarding its seizure. I respectfully agree with the views expressed in the above decision regarding the scope and applicability of Section 523, Criminal P. C., subject however to one observation, namely, that this Section does not prevent the Police from releasing a property to the person from whom it was seized, if they find in

the course of investigation that the seizure was unjustified; but when once the Court is moved under Section 523, Criminal P. C. the Police must hold the property subject to the orders of the Court.

7. Another decision to which reference may be made in this context is that of the Madhya Bharat High Court in *Ramlal Hazarimal v. Hiralal Ramalal*, AIR 1953 Madh Bha 241. In that case money said to have been misappropriated by the accused, who was a Municipal employee, was seized by the Police from the accused's father. The Police did not produce the money in Court; but it was handed over to the Municipality. The accused was finally acquitted, and then the father applied for return of the money seized from him. The application was rejected on the ground that neither Section 517 nor 523, Criminal P. C. applied to the case, and that at any rate, as the property had been already released by the Police, there was no scope for any action by the Court under any of the above provisions. The contention was rejected, and dealing with the scope of Sections 516-A, 517 and 523, Criminal P. C., the Court said:

"On consideration of all these provisions it is plain that after property is seized by the Police, orders for its final disposal can only be passed by the Court and the Police are expected to hold the property subject to the orders of the Magistrate. Therefore if the property is with the Police, the Magistrate alone has got jurisdiction to pass orders."

I agree with the above statement, but subject to the observation which I have made above.

8. The Court also held that the fact that the Police wrongly handed over the property to a person who claimed it does not affect the Court's jurisdiction to act under Section 523, Criminal P. C., and it directed the Police to recall the money from the Municipality and produce the same before the Magistrate for being disposed of under Section 523, Criminal P. C. I reserve my opinion on the question whether the Court can act under the above Section, after the Police have already handed over the property to a person who claimed it, though the disposal by the Police was wrong. The direction to produce the property in Court for being disposed of under Section 523, Criminal P. C. would indicate an assumption that the production of the property in Court is necessary for passing the necessary orders under this Section. In my opinion, such an assumption is not warranted by the language of the Section.

9. In the result, I set aside the order of the Magistrate, and direct him to pass such orders as he thinks fit respecting the disposal of the motor car seized by the Police.

is expeditiously as possible after hearing the interested parties.

Order set aside.

1970 CRI. L. J. 1107 (Vol. 76, C. N. 272)=

AIR 1970 MADRAS 311 (V 57 C 85)

KRISHNASWAMY REDDY, J.

The Public Prosecutor, Government of Pondicherry, Appellant v. Abdul Aziz Khan and another, Respondents.

Special Appeal (Criminal) No. 296 of 1967 (P), D/- 1-4-1969.

(A) General Clauses Act (1897), S. 6 — Different intention — What is to be seen is whether new Act manifests intention to destroy old rights and liabilities.

It is a well-established principle that in applying the principle in respect of S. 6 of the General Clauses Act and the savings sections of any special enactment, line of enquiry should be not whether the new Act expressly keeps alive the old rights and liabilities but whether it manifests an intention to destroy them. It has to be ascertained whether there is any contrary intention in respect of savings in the new legislation. (Para 12)

(B) Companies Act (1956), Ss. 648, 658 — General Clauses Act (1897), S. 6 — Prosecution instituted in respect of offences under Companies Act, 1913, long after Act of 1956 came in force in Pondicherry territory — Neither S. 648 nor application of S. 6 of General Clauses Act as provided in S. 658 can save prosecution. AIR 1960 SC 794 & AIR 1961 SC 29, Rel. on — (General Clauses Act (1897), S. 6). (Paras 12, 14)

(C) Companies Act (1956), S. 633 (1) — Section applies to all proceedings civil, criminal or otherwise — Absence of criminal intention is irrelevant while dealing with person under this section.

Under S 633(1), it is not the criminal intention which is required for consideration. Obviously, negligence and default mentioned in Sec 633(1) will not involve criminal intention on the part of the person who is proceeded against for negligence or default. To deal with a person under this provision, the absence of criminal intention is irrelevant. But what is relevant is whether he acted honestly namely, in good faith and whether he had any justifiable reason to escape from the liability. This section cannot be equated with a discharge or acquittal provided under the Criminal Procedure Code. This section will apply to all legal proceedings, civil or criminal or otherwise instituted under this Act.

(Para 15)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 29 (V 48) =

(1961) 1 SCR 417, Raja Narayanlal v. M. P. Mistry 14

(1960) AIR 1960 SC 794 (V 47) =

1960 SCJ 760, Brihan Maharashtra Sugar Syndicate Ltd. v J. R Kulkarni 13

Public Prosecutor, for Pondicherry, for Appellant; Vedanatham Srinivasan, for Respondents.

JUDGMENT:— This appeal has been filed by the Public Prosecutor, Government of Pondicherry, against the order of acquittal by the First Class Magistrate No. 2, Pondicherry, of the two respondents in C. C. No. 397 of 1966, on the private complaint filed by the Registrar of Companies, Pondicherry, against them under Sections 208-D (2), 208-E (3) and 244(3) of the Indian Companies Act, 1913. (hereinafter called 'the Act'). The second respondent is since dead.

2. The Prosecution case is briefly this: Amara Pictures Private Limited was incorporated on or about 26-10-1949 as a private company under the Indian Companies Act, 1913. It had its registered office at No. 61, St., Therese Street, Pondicherry. By a special resolution passed by the members of the Company on 15-5-1963, the Company was required to be wound up voluntarily and the two respondents were appointed as liquidators of the Company. The respondents had notified their appointment as the liquidators on 20-6-1963. By a letter dated 7-11-1963 the respondents on behalf of the Company informed the Registrar of Companies that they have held the final meeting of winding up in accordance with S. 208-E of the Indian Companies Act, 1913 on 30-10-1963 and that they have prepared all returns already and requested for a few days time to file the returns with the complainant. In spite of several letters and reminders sent by the Registrar of Companies, Pondicherry the respondents did not send returns; nor did they care to reply or take steps to comply with the requirements of the provisions of the Indian Companies Act. The two respondents have failed and neglected to file returns for the period from 15-5-1963 to 14-3-1964 and 15-3-1964 to 14-3-1965. Thereupon, a final notice was issued to the respondents on 19-4-1966 explaining therein the implications and stating that unless they comply with the requirements, they would be prosecuted. They were also given 15 days' time for filing the returns. The second respondent by his letter dated 6-5-1966 explained the reasons for the delay and requested for a fortnight's time for filing returns. As they had failed to submit the returns, they were again reminded of the expiry of the time of 14 days granted to them. The respondents

have not taken further steps. Hence the complaint was filed under Sections 208-D (2), 208-E(3) and 244(3) of the Act.

3. Sec. 208-D(1) of the Act provides that in the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the Company at the end of the first year from the commencement of the winding up and of each succeeding year, as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation. Sec 208-D (2) provides for a penalty of not exceeding Rs 100/- if the Liquidator fails to comply with the section. It is the case of the prosecution that the pendency of winding up has exceeded more than a year and the company has not called for a general meeting as required by Sec 208-D of the Act and in spite of the letter by the Registrar dated 20-1-1966 and a reminder issued thereafter the Liquidators have not taken action. Under Sec 208-E (3), the Liquidator, within one week after the meeting shall send to the Registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made as required, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues. Under Sec 244(1) of the Act, if the winding up is not completed within one year from the date of its commencement, the liquidator shall submit a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and the position of the liquidation, to the Registrar of Companies every year during the tenure of such liquidator.

4. Sri Krishnamurthy, the Registrar of Companies and Sri Sethuraman Upper Division Clerk in the office of the Registrar of Companies were examined as prosecution witnesses to support the facts spoken to in the complaint.

5. When the respondents were questioned, the first respondent stated that he was in the hospital and as he was not doing well, he could not submit returns in time. The second respondent stated that he could not submit returns as the account books were with the first respondent and as he was unwell.

6. The learned first Class Magistrate acquitted the respondents on two grounds namely (1) that the Companies Act of 1913 was not in force on the date of the therefore, the prosecution was sustained as the Companies Act, 1956 had come into force by then and that, therefore, the prosecution under

the Act of 1913 was unsustainable; and (2) that even assuming that the prosecution was sustainable, the respondents have to be relieved from their liability as they had no criminal intention in having contravened the provisions of the Act, by virtue of Sec. 633 of the Companies Act, 1956.

7. The learned Public Prosecutor contended that both the reasons given by the learned Magistrate for acquitting the respondents are incorrect and submitted that the prosecution under the provisions of the Companies Act, 1913 was saved by the repealing Act of 1956 and that, therefore, the prosecution was sustainable and he further submitted that Section 633 of the Companies Act, 1956 gives relief to those persons who acted honestly and reasonably while they may be liable in respect of negligence, default, breach of duty, misfeasance or breach of trust. To appreciate the submissions made by the learned Public Prosecutor, it is necessary to note the following facts.

8. Pondicherry was a French territory till October, 1954. By virtue of the merger agreement dated 21-10-1954, there was a de facto transfer of Pondicherry territory to the Indian Union on 1-11-1954 which was followed up by the Treaty of Cession dated 28-5-1956. Before October, 1954, the Code of French Laws, civil and criminal, based upon the Continental System of Jurisprudence prevailed in the Courts of Pondicherry. On 1-11-1954 which is the date of de facto merger, by the promulgation of the French Establishments (Application of Laws) Order, 1954, certain Acts mentioned in the schedule therein came into force in Pondicherry. The Indian Companies Act (Act VII of 1913) by virtue of the said Regulation came into force on 1-11-1954.

9. Act VII of 1913 was repealed and re-enacted by the Parliament by Act I of 1956 (The Indian Companies Act, 1956). The de jure transfer of Pondicherry territory took effect on 16-8-1962 which is known as the "appointed day". Act 49 of 1962 came into effect on 5-12-1962 and on 28-12-1962, the Fourteenth Amendment to the Constitution became effective, and the territory of Pondicherry was classified as a Union Territory, included as the 9th item in Part II of the First Schedule. By virtue of Regulation No 7 of 1963 (The Pondicherry (Laws) Regulation, 1963) promulgated by the President of the Republic in exercise of the powers conferred under Art 240 of the Constitution, the Acts mentioned in the Schedule to the Regulation including the Indian Companies Act, 1956 came into force in Pondicherry Territory on 1-10-1963. Before Act I of 1956 came into force in the Pondicherry territory, the Company was wound up voluntarily on

5-5-1963 and the respondents were appointed liquidators on 20-6-1963. After the Act came into force in Pondicherry, the final meeting was held as required under Sec 208-E (1) on 30-10-1963. As the winding up and the appointment of the respondents as liquidators were before Act I of 1956 came into force in Pondicherry territory the prosecution was launched under the provisions of Act VII of 1913.

10. The question, therefore, that arises now is whether, after Act I of 1956 came into force in Pondicherry on 1-10-1963, the prosecution against the respondents is saved?

11. We have, therefore, to note the relevant provisions of repeal and savings in Act I of 1956 (hereinafter called "the Act"). Under Sec. 644 of the Act, enactments mentioned in Schedule XII were repealed. Sec. 645 saves orders, rules, etc., in force at commencement of Act. Sec. 646 saves the operation of Sec. 138 of Act VII of 1913 as respects inspectors and the continuation of an inspection begun by inspectors, appointed before the commencement of the Act. Sec. 646 saves pending proceedings for winding up. Sec. 648 which is the relevant section in respect of our discussion is as follows:

"Saving of prosecutions instituted by liquidator or Court under Section 237 of Act VII of 1913:— Nothing in this Act shall affect any prosecution instituted or ordered by the Court to be instituted under Section 237 of the Indian Companies Act, 1913 (VII of 1913), and the Court shall have the same power of directing how any costs, charges, and expenses properly incurred in any such prosecution are to be defrayed as it would have had, if this Act had not been passed"

Sections 650 to 657 also deal with savings which may not be necessary to consider in detail. The next relevant section with which we are concerned is Sec. 658 which reads thus:

"Section 6 of the General Clauses Act, 1897 (X of 1897) to apply in addition to Sections 645 to 657 of Act— The mention of particular matters in Sections 645 to 657 or in any other provision of this Act shall not prejudice the general application of Section 6 of the General Clauses Act, 1897 (X of 1897), with respect to the effect of repeals"

12. The learned Public Prosecutor, Pondicherry, relies upon Sec. 658 and submits that if the Prosecution in respect of things that occurred before Act I of 1956 came into force was not saved by virtue of Sec. 648 of the Act, it would be saved by Sec. 658 of the Act by which the provisions of the General Clauses Act could be applied in addition to the savings provided in the Act in Secs. 645 to 657. It is clear that Sec. 648 of the

Act saves only those prosecutions instituted by liquidator or ordered by the Court to be instituted under Sec. 237 of the Indian Companies Act, 1913, before the commencement of Act I of 1956 and pending at its commencement and that such prosecutions alone could continue after the commencement of the Act. But this section will not apply to prosecution not instituted or not ordered by the Court before the commencement of the Act. It is not the case of the prosecution that in the present case, the prosecution was instituted by the liquidator before the commencement of Act I of 1956. The prosecution was instituted in respect of offences under Act VII of 1913 on 6-8-1966, long after Act I of 1956 came into force in the Pondicherry territory and, therefore, the present prosecution is not saved by Sec. 648 of the Act. If Sec. 6 of the General Clauses Act is applied, by virtue of Clause (e) of the same section, the repeal of any Act shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed and by virtue of Clause (e) of the same section, any legal proceeding or remedy in respect of any such right, liability etc., are saved unless a different intention appears. We have to consider, in view of the specific savings in respect of prosecution provided under Sec. 648 of the Act whether Sec. 6 of the General Clauses Act can be invoked in respect of the present prosecution. It is a well-established principle that in applying the principle in respect of S. 6 of the General Clauses Act and the saving sections of any special enactment, line of enquiry should be not whether the new Act expressly keeps alive the old rights and liabilities but whether it manifests an intention to destroy them. It has to be ascertained whether there is any contrary intention in respect of savings in the new legislation. As already noted, Section 648 of the Act specifically saved the prosecutions instituted by the liquidator or ordered by the Court. This gives the indication that the Parliament had specifically considered as to what should be saved and excluded the saving of the prosecution of any liability incurred before the commencement of the Act. The contrary intention is clearly expressed by specifically including only the proceedings which had resulted in prosecution. The pending prosecutions alone are saved and not the liability incurred leading to a prosecution and such liability is destroyed. The general principle under Sec. 6 of the General Clauses Act "unless a different intention appears" can also be considered in view of the specific savings made in respect of the things mentioned therein in Sections 645 to 657 of the Act.

13. In *Brihan Maharashtra Sugar Syndicate v. J. R. Kulkarni*, 1960 SCJ 760=(AIR 1960 SC 794), the Supreme Court held in that case that Sec. 153-C of the Companies Act, 1913 and the continuance of proceedings in respect thereof are saved by the application of Sec 6 of the General Clauses Act provided under Sec. 658 of Act I of 1956 in that Sec 647 of the Companies Act of 1956 does not indicate any intention that the rights created by Sec 153 (c) of the Act of 1913 shall be destroyed. It is made clear in this decision that Sec. 6 of the General Clauses Act will apply unless a different intention could be gathered from the new enactment

14. In *Raja Narayanlal v. M. P. Mistry*, AIR 1961 SC 29, the Supreme Court again in considering the scope of Sections 645 to 647 of Act I of 1956 and the effect of the provisions of Section 6 of the General Clauses Act as provided under Section 658 of the Act, in dealing with the savings in respect of Section 138 of Act 7 of 1913 as provided in the saving Section 645 of Act 1 of 1956 observed that Sections 645 to 648 are the saving sections, and ordinarily in the absence of any indication to the contrary these saving sections should be read as independent of, and in addition to, and not as providing exceptions to, one another. On this view, Section 648 should be construed as an additional saving provision. Applying this principle in this additional saving provision under Section 648, the contrary intention clearly appears in respect of the savings of any legal liability not resulting in prosecution. I am, therefore, of the view that neither Section 648 nor the application of Section 6 of the General Clauses Act as provided in Section 658 of the Act saves the present prosecution. In the result, I find that the prosecution is unsustainable.

15. In respect of the second point, the learned Magistrate was clearly in error. Section 633 of the Act confers power on the Court to grant relief in certain cases and Section 633 (1) reads thus

"If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think fit"

Under this provision, it is not the criminal intention which is required for consideration. Obviously, negligence and default

mentioned in Section 633 (1) will not involve criminal intention on the part of the person who is proceeded against for negligence or default. This section gives a discretion to the Court to relieve the person proceeded against for those acts mentioned therein, provided the Court finds that that person has acted honestly and reasonably and also the other circumstances of the case including the circumstances leading to the appointment of such person and in doing so, it could relieve him either wholly or partly from his liability on such terms as it may think fit. To deal with a person under this provision, the absence of criminal intention is irrelevant. But what is relevant is whether he acted honestly namely, in good faith and whether he had any justifiable reason to escape from the liability. This section cannot be equated with a discharge or acquittal provided under the Criminal Procedure Code. This section will apply to all legal proceedings civil or criminal or otherwise instituted under this Act.

16. In the result, the appeal is dismissed.

Appeal dismissed.

1970 CRI. L. J. 1110 (Vol. 76, C. N. 273)=

AIR 1970 MADRAS 315 (V 57 C 87)

VENKATARAMAN, J.

In re, V V Govindan and another, Accused, Petitioners

Criminal Revn Case No 941 of 1967, (Cri. Revn Petn No 928 of 1967), D/-14-8-1969, from order of Dist. Magistrate, Coimbatore, in S T R No 30 of 1967

Essential Commodities Act (1955), S. 7 (1) (a) (ii) — Madras Gur and Khandsari Sugar Dealers Licensing Order (1963), Cl. 3 — Accused dealing in Khandsari Sugar without licence — Mere fact that he had applied for licence cannot exonerate him from punishment for contravention of order — His servant, however is not liable. AIR 1966 SC 43, Disting.; AIR 1961 SC 631, Ref. (Paras 2, 3, 4)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 43 (V 53) =

1966 Mad LJ (Cri) 679 = (1966)

2 SCJ 421 = 1966 Cri LJ 71,

Nathulal v. State of Madhya Pradesh

(1961) AIR 1961 SC 631 (V 48) =

(1961) 3 SCR 324 = 1961 (1) Cri

LJ 747, Sarjoo Prasad v State

of U P

B Sriramulu, for Petitioners, R Gandhi, for Public Prosecutor, for State

ORDER:— This revision case has been filed by the two accused in a case tried summarily by the learned District Magis-

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trate of Coimbatore for contravention of the provisions of the Madras Gur and Khandsari Sugar Dealers Licensing Order, 1963-read with Section 7 (1) (a) (ii) of the Essential Commodities Act, 1955. It is alleged that accused 1 who is the proprietor of V. V. Govindan and Co., and accused 2 who is the clerk of the said company, were dealing in Khandsari Sugar over 25 quintals at a time, between 1st April 1965 and 19th March 1966, without obtaining a licence under the said Order.

2. The learned District Magistrate has found, on the evidence that accused 1 was dealing in Khandsari Sugar over 25 quintals at a time during the relevant period. That finding is not challenged before me. The defence of accused 1 was that he had applied for a licence on 2nd February 1965 itself enclosing a chalan for Rs 5 the fee for the licence. The learned District Magistrate finds that this is also true. But he has convicted accused 1 on the ground that till the date of inspection namely 19th March 1966, the licence was not issued and that the mere fact of his having applied for a licence would not be a valid defence. On this reasoning, he convicted both the accused and sentenced them to pay a fine of Rs 300 and Rs. 100 respectively.

3. Clause 3 of the Order states that with effect on and from such date as the Government may specify, no person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority. Hence, it is clear that a licence was required and that accused 1 who carried on business would be guilty. The learned counsel for accused 1, however, relies on the decision of the Supreme Court in *Nathulal v. State of M. P.*, 1966 Mad LJ Cri 679 = (1966) 2 SCJ 421 = (AIR 1966 SC 43), in support of the contention that in view of the application of accused 1 for a licence made on 2nd February 1965, he could be considered to have been under the bona fide impression that he was entitled to deal in sugar and that he did not have the necessary mens rea to defeat the provisions of the order. In the reported case, the person concerned has applied for a licence, but before he got it, he purchased and stored wheat and he was submitting returns periodically showing his purchase. He did not, however, sell any quantity thereof. There was also evidence in the case to show that he was assured that he would be getting the licence shortly and that he need not worry. It was held by Subba Rao and Bachawat, JJ (Shah, J. dissenting) that the necessary mens rea was lacking. The learned District Magistrate distinguished the present case on the ground that here accused 1 did not submit any returns and that he was actually

selling the sugar. In my opinion, the distinction made by the learned District Magistrate is sound. The conviction of accused 1 is, therefore, correct, but I reduce the sentence of fine to Rs 100.

4. So far as accused 2 is concerned, it cannot be said that he was carrying on business in sugar. He was only a clerk and the person who was doing business was his master, accused 1. Clause 3 of the Order in question is differently worded from Acts like the Madras Prevention of Food Adulteration Act, where, for instance, the person who actually sells any adulterous food even if he is only a servant, is made liable (*Vide Sarjoo Prasad v. State of U. P.*, (1961) 3 SCR 324 = (AIR 1961 SC 631)). I accordingly set aside the conviction of accused 2 and the sentence of fine imposed on him. The fine amount paid by accused 2 and the excess fine paid by accused 1 will be refunded to them.

Order accordingly

1970 CRI. L. J. 1111 (Vol. 76, C. N. 274) =
AIR 1970 MADRAS 333 (V 57 C 95)

SADASIVAM, J.

In re, V. Subramaniam, Petitioner,
Accused.

Criminal Revn. Case No 288 of 1967
and CrL. Revn. Petn. No 285 of 1967, D/-
22-11-1968, against Judgment of Dt.
Magistrate (J). South Arcot, Cuddalore
D/- 28-10-1966

Penal Code (1860), S. 188 — Disobedience to order duly promulgated by public servant — Mere disobedience is not by itself an offence unless it entails one or other of consequences mentioned in section — There should be evidence and finding that act of disobedience caused or tended to cause riot or affray — Conviction under the Section was set aside. (Paras 5 and 6)

C K Venkatanarasimham, for Petitioner, R. Veeramani, for Public Prosecutor, for State.

ORDER:— Petitioner Subramaniam was convicted under Ss 447, 379 and 188 I.P.C. and sentenced to undergo rigorous imprisonment for two months on each of the first two counts and simple imprisonment for one month on the last count, by the Sub-Magistrate, Tindivanam, and the sentences were ordered to run concurrently. But the learned District Magistrate, South Arcot, on appeal set aside the convictions under Ss 447 and 379 I.P.C. and the sentences imposed in respect of the same, but confirmed the conviction of the petitioner only under S. 188 I.P.C. and modified the sentence to one of fine of Rs. 100 in default to

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undergo simple imprisonment for one week.

2. The complaint in this case was referred by the Sub-Divisional Magistrate, Villupuram, on the ground that an order passed in MC 189 of 1962 on the file of that court on 13-11-1962 was disobeyed by the petitioner on 12-5-1966. The petitioner was the tenth respondent in the proceedings under Sec 145 CrI. P. C. and he claimed item 8 in the schedule of properties in the said petition, which is the subject-matter of the present case, as having been taken by him on lease from the original owner, Padmanabha Gramani. It should be noted that the claims which led to civil disputes and the proceedings under S 145 CrI P. C. were between persons who claimed title as heirs of the said Padmanabha Gramani. In fact, an order of interim injunction was passed by the High Court against the petitioners in the proceedings under S 145 CrI P. C. Sri C. K. Venkatanarasimham appearing for the petitioner questioned the validity of the order under S. 145 CrI P. C. on the above materials, but in my opinion, he is not entitled to do so as he failed to seek relief by taking proceedings against the said order, which has become final. Sri C. K. Venkatanarasimham has also taken a ground that the order under S. 145 CrI P. C. has not been promulgated. But he fairly conceded that he could not urge such a ground as he was a party who took part in the proceedings in which the order was passed against him and others.

3. The main contention to be considered in this case is whether the disobedience of the order passed under S 145 CrI P. C. entailed one or other of the three consequences mentioned in Section 188 I.P.C.

4. The first consequence mentioned in Sec 188 I.P.C. refers to such disobedience which 'causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed'. Obviously, this clause could have no application to the order in question. It would generally apply to cases where orders passed have to be enforced by public officials directly or through others lawfully employed by them. It is not necessary to state who all could be considered as coming within the clause 'persons lawfully employed'. The earlier part of third para of S 188 I.P.C. refers to the second consequence, namely, 'such disobedience' which 'causes or tends to cause danger to human life, health or safety'. This will apply to cases of disobedience of orders passed under Chapter X, CrI P. C. to prevent offences falling under Chapter XIV of the Indian Penal Code relating to public nuisances and similar cases. The third consequence referred to in the latter part

of the third para of S. 188 I.P.C. is one relevant to this case, namely, such disobedience of the order which 'causes or tends to cause a riot or affray'.

5. The order under S 145 CrI P. C. could be made only when the dispute as to immovable property is "likely to cause breach of the peace". If such an order is disobeyed and it 'causes or tends to cause a riot or affray', the person disobeying such order ought to be punished as the object of the order is to prevent breach of the peace. But before a person could be punished for disobedience of an order under S. 145 CrI P. C. there should be evidence and a definite finding based on that evidence that his act of disobedience caused or tended to cause a riot or affray. I have already pointed out that there is no such finding by either of the courts below that the act of the petitioner caused or tended to cause riot or affray. The order under S 145 CrI. P. C. was passed on 13-11-1962 and the disobedience complained of was nearly three and half years later on 12-5-1966. Having regard to the long interval between the date of the order and the date of disobedience of the same, the likelihood of the breach of the peace being caused by reason of the disobedience of the order could not also be presumed. The courts below have failed to note that mere disobedience of an order promulgated by a public servant is not in itself an offence unless it entails one or other of the consequences mentioned in S. 188 I.P.C.

6. The learned District Magistrate has acquitted the petitioner in respect of both the offences under Ss 447 and 379 I.P.C. So far as the offence punishable under S 379 I.P.C. is concerned, he was of the view that the ingredients of the said offence have not been made out. He has observed that 'it cannot at all be said, having regard to the facts of this case, that the appellant cut and carried away the casurina from the tope with any dishonest intention'. He has observed that, it is obvious that he had done so in an attempt to set up his title to the casuarina standing thereon, however ill-founded his claim may be. This finding itself is inconsistent with the mens rea required, namely, knowingly disobeying an order so as to result in one or other of the consequences, mentioned in S 188 I.P.C. It should be noted that the order was passed about 3½ years prior to the occurrence in this case. I looked into the oral evidence adduced in this case. PW 1 Jagadeesa Gramani has merely spoken to the fact that the trespass as well as the removal of the casuarina trees was about 10 or 15 days after the cyclone and that he came to know of the same by a letter received by him about 1½ months prior to his giving evidence. P.W. 2

Kannan, P.W. 3. Perumal and P.W. 4, Manickasami who all speak to the removal of the casuarina trees by the petitioner, have not even whispered that there was any likelihood of the breach of the peace

7. For the foregoing reasons, the conviction of the petitioner under S. 188 I.P.C. cannot be sustained and it is set aside. The petitioner is acquitted even in respect of the charge under S 188 I.P.C. and the fine amount, if collected, is ordered to be refunded to him.

8. The criminal revision case is allowed.

Revision allowed.

1970 CRI. L. J. 1113 (Vol. 76, C. N. 275) =

AIR 1970 MYSORE 195 (V 57 C 49)

M SANTHOSH, J.

Ramazan Bi, Complainant, Petitioner v Bhimsen Rao, Accused, Respondent.

Criminal Revn Petn. No. 311 of 1969, D/- 21-1-1970 from order of 1st Class Magistrate, Raichur, D/- 18-4-1969.

(A) Criminal P. C. (1898), Section 197 — Mysore Land Revenue Act (12 of 1964), Section 16 (1) — Accused a village Accountant — By virtue of Section 16 (1) of the Act and Rule 6 of the Village Accountants Recruitment Rules, Deputy Commissioner a competent appointing authority — Even if power of appointment is delegated by Government to Deputy Commissioner, no sanction of Government under Section 197 is required. Cri. Revn. Petn. No. 115 of 1968 (Mys), Dissented from.

The Deputy Commissioner being a competent authority to appoint a village Accountant (Patwari) it is not necessary to get the sanction of the State Government under Section 197, Cr. P. C. for the prosecution of a Village Accountant. (Para 9)

By virtue of Section 16 (1) of the Mysore Land Revenue Act (1964) the Deputy Commissioner is the competent authority to appoint a Village Accountant and if there are any general orders of the State Government or the Divisional Commissioner governing the appointment of Village Accountants, the Deputy Commissioner should exercise the power of appointment of a Village Accountant so as to conform to such orders. There is nothing in this Section which warrants an inference that the Government or the Divisional Commissioner should sanction the post of Village Accountant and the sub-section (1) clearly empowers the Deputy Commissioner to appoint a Village Accountant. Under Rule 6 of the Mysore General Services (Revenue Subordinate Branch) Village Accountants (Cadre and Recruitment) Rules 1961, the appointing authority in respect of a Village

Accountant is the Deputy Commissioner of the District. Even assuming that the power of appointment is delegated by the Government to the Deputy Commissioner, no sanction of the Government under Section 197, Cr. P. C. is required for the prosecution of a Village Accountant. Once the power is delegated by the Government, the sanction of Government is not necessary. AIR 1967 SC 1331 & AIR 1965 Mys 128 & (1968) 2 Mys LJ 366, Foll; Cri. Revn. Petn. No. 115 of 1968 (Mys), Dissented from. (Paras 4, 5)

(B) Civil P. C. (1908), Pre. — Judicial precedents — Contrary decision of Single Judge — Division Bench and Supreme Court decision on the point — Decisions are binding — No need to refer the case to Division Bench — (Constitution of India, Article 141). (Para 8)

Cases Referred: Chronological Paras

(1968) 1968-2 Mys LJ 366 = 12 Law Rep 275, C. S. N Murthy v. State of Mysore 2, 4, 7
(1968) Cri. Revn Petn. No 115 of 1968 (Mys) 3, 7, 8
(1967) AIR 1967 SC 1331 (V 54) = 1967 Cri LJ 1200, Shukla v. Navnit Lal 2, 3, 5, 7, 8
(1965) AIR 1965 Mys 128 (V 52) = 1965 (1) Cri LJ 565, Krishna Murthy v Abdul Subhan 2, 6

B S. Raikote, for Petitioner; Murlidhar Rao, for Respondent.

ORDER:— The petitioner before this Court was the complainant in C. C. 195/3 of 1969 on the file of the first Class Magistrate, Raichur. He filed a complaint under Sections 166 and 167, Indian Penal Code against the accused, who is a Patwari (Village Accountant) The accused raised a preliminary objection that the case could not be proceeded with as sanction of the Government under Section 197, Criminal Procedure Code had not been obtained. The learned Magistrate upheld the objection of the accused and dismissed the complaint. In this revision petition, the petitioner challenges the legality of the said order passed by the learned Magistrate.

2. Sri Raikote, learned counsel appearing on behalf of the petitioner, has contended that under Section 16 of the Mysore Land Revenue Act, 1964, (which will be hereinafter be referred to as the Act), the Deputy Commissioner is the competent authority to appoint Village Accountants. He argues that there is no delegation of the power of appointment by the Government to the Deputy Commissioner. The words 'subject to the general orders' used in Section 16 (1) only mean, subject to the general orders of the Government with regard to the number of appointments or vacancies, and has no reference to the competency of the Deputy Commissioner to appoint Village Accountants. Even as per Rule 6 of the Mysore General Services (Revenue Subordinate Branch) Vil-

lage Accountants (Cadre and Recruitment) Rules, 1961, the appointing authority in respect of Village Accountants, shall be the Deputy Commissioner of the District. Sri Raikote, in support of his said contention, has strongly relied on a Bench decision of this Court, *C. S. N. Murthy v. State of Mysore*, (1968) 2 Mys LJ 366. It is further contended by him that even assuming that the power of such appointment is delegated by the Government to the Deputy Commissioner, once such powers are delegated no sanction of the Government is required as per Section 197, Criminal Procedure Code. In support of his said contention, he has relied on *Shukla v. Navnit Lal*, AIR 1967 SC 1331 and *Kushna Murthy v. Abdul Subhan*, AIR 1965 Mys 128.

3. Sri Murlidhar Rao, learned Counsel appearing on behalf of the respondent-acused, has argued that Section 16 of the Act specifically states that the Deputy Commissioner, may subject to the general orders of the State Government and the Divisional Commissioner, appoint a Village Accountant. He contends that unless the Deputy Commissioner gets the general orders of the State Government, he cannot appoint a Village Accountant. He argues that in the instant case there is no delegation of power by the Government to the Deputy Commissioner. The decision of the Supreme Court in AIR 1967 SC 1331 has no application to this case as there is no delegation of such power. The exercise of the power under Section 16 of the Act is subject to the general orders of the Government, and as the Government is the final authority so far as the appointment of Village Accountant is concerned, sanction of Government is necessary before a Village Accountant could be prosecuted. Sri Murlidhar Rao has relied on an unreported decision of a Single Judge of this Court rendered in Cri. Revn. Petn No 115 of 1968 (Mys). The accused in that case was a Village Accountant in Dharwar District. A preliminary objection raised by him that he could not be prosecuted for offences under Sections 166, 167 and 218, Indian Penal Code without prior sanction of the Government was upheld by this Court.

4. Section 16 (1) of the Act, reads as follows:—

"16. Village Accountant. — (1) the Deputy Commissioner may, subject to the general orders of the State Government and the Divisional Commissioner, appoint a Village Accountant for a village or group of villages and he shall perform all the duties of a Village Accountant prescribed in or under this Act or in or under any other law for the time being in force, and shall hold office under and be governed by such rules as may be prescribed."

In (1968) 2 Mys LJ 366, a Division Bench of this Court had occasion to interpret the wording of the said Section. At page 372, their Lordships observed as follows.—

"We are unable to accept the construction which Mr. Rama Jois seeks to place on Section 16 (1). The exercise of the power given to the Deputy Commissioner under Section 16 (1) to appoint a Village Accountant is not made conditional upon the rules having been framed prescribing the duties of the Village Accountant and conditions of his service. What this sub-section provides is that a Village Accountant appointed under Section 16 (1) shall perform such duties and be governed by such conditions of service as may be prescribed whether before or after he is appointed. Similarly, if rules are framed under the Land Revenue Act regulating the appointment of the Village Accountants, thereafter the appointment of a Village Accountant by the Deputy Commissioner should be in accordance with those rules. But the power conferred on the Deputy Commissioner to appoint a Village Accountant is not kept in abeyance until such Rules are made. We think the Deputy Commissioner is competent to appoint a Village Accountant even before any rules are framed, or even in the absence of such Rules."

Further their Lordships observed as follows —

"x x x x What this sub-section states is that if there are any general orders of the State Government or the Divisional Commissioner governing the appointment of Village Accountants the Deputy Commissioner should exercise his power to appoint Village Accountants so as to conform to such orders. If there are no orders of the Government or the Divisional Commissioner in this behalf, the power of the Deputy Commissioner is not rendered ineffective or kept in abeyance until such order is made. There is nothing in this sub-section which warrants an inference that the Government or the Divisional Commissioner should sanction the post of a Village Accountant for any village or a group of villages before the Deputy Commissioner can appoint a Village Accountant. The sub-section clearly empowers the Deputy Commissioner to appoint a Village Accountant to a village or a group of villages. It may be, that administrative sanction of the Government is necessary before creating a new post which must necessarily involve financial consequence to the State in the form of salary, allowances payable to the holder of the post and other expenditure. But such administrative sanction is de hors the provisions of the Land Revenue Act and is purely an internal matter within the Government organisation."

In the above-said decision, their Lordships have clearly stated that the Deputy Commissioner is the competent authority to appoint a Village Accountant and if there are any general orders of the State Government or the Divisional Commissioner governing the appointment of Village Accountants, the Deputy Commissioner should exercise the

power of appointment of a Village Accountant so as to conform to such orders. Their Lordships have also pointed out that there is nothing in this Section which warrants an inference that the Government or the Divisional Commissioner should sanction the post of Village Accountant and the sub-section clearly empowers the Deputy Commissioner to appoint a Village Accountant. It may further be mentioned that their Lordships have pointed out in the said Judgment that the Village Accountants Recruitment Rules, of 1961, which were made in the exercise of the powers under the proviso to Article 309 of the Constitution and Section 233 of the Mysore Land Revenue Code, should, to the extent to which there is no inconsistency, be deemed to have been made in exercise of the powers under Section 197 of the Land Revenue Act also. Under Rule 6 of the said Rules, the appointing authority in respect of a Village Accountant is the Deputy Commissioner of the District. There is therefore no force in the contention of Sri Murlidhar Rao that the appointing authority so far as the Village Accountants are concerned, is the Government and not the Deputy Commissioner.

5. I am also of opinion that there is force in the contention of Sri Raikote that even assuming for the sake of argument that the power of appointment is delegated to the Deputy Commissioner, no sanction of the Government under Section 197 Criminal Procedure Code is required. That this is the legal position has been laid down by the Supreme Court in AIR 1967 SC 1331. In paragraph 9 of the judgment, their Lordships have observed as follows:—

“It was suggested on behalf of the appellant that even if the Railway Board had power to remove the appellant from the office and even if it was acting under the powers delegated to it, the principle of the maxim *qui facit per alium facit per se* applies to the case and the appellant must be deemed to be removable only by or with the sanction of the Central Government within the meaning of Section 197 of the Criminal Procedure Code. We do not think there is any substance in this argument. If once the Central Government has delegated its power to another authority with regard to appointment and removal of a public servant, then for the purpose of Section 197, Criminal Procedure Code the public servant concerned will not be treated to be a public servant ‘not removable from his office except by or with the sanction of the Central Government’ within the meaning of that section.”

6. Similar was the view expressed by Hegde, J., (as he then was) in AIR 1965 Mys 128. It has been laid down in the said case that the protection under Section 197, Criminal Procedure Code is not available to a public servant, whom lower authority, has, by law or order, been empowered to remove. His Lordship has held that where on the

date of taking cognizance of the offences the accused, a treasurer, could have been removed from service by the Comptroller of State Accountants, who had power to appoint as well as dismiss a treasurer by virtue of Regulation 71 of the Mysore Service Regulations, the accused is not a public servant who is not removable from his office ‘save by or with the sanction of the State Government’ within the meaning of Section 197, Criminal Procedure Code and as such no sanction to prosecute him is necessary.

7. In Cr. Revn. Petn. No 115 of 1968 (Mys), his Lordship has held that the authority to appoint and remove a Village Accountant under Section 16 of the Act has been delegated to the Deputy Commissioner and the Deputy Commissioner can appoint a Village Accountant only under the general orders of the State Government and hence sanction of the State Government for prosecution is necessary. As pointed out already a Bench of this Court in 1968-2 Mys LJ 366 has held that the Deputy Commissioner is the competent authority to appoint a Village Accountant, and that Section 16 empowers the Deputy Commissioner to appoint a Village Accountant. The Supreme Court in AIR 1967 SC 1331 has also clearly laid down that once the power is delegated by the Government, the sanction of the Government for prosecution is not necessary.

8. Sri Murlidhar Rao has submitted that in view of the decision of a Single Judge rendered in Cr. Revn. Petn. No. 115 of 1968 (Mys), this is a fit case where the matter should be referred to a Division Bench for decision. The Supreme Court, in AIR 1967 SC 1331 has clearly laid down that in a case where the power of appointment and removal has been delegated by the Government to a subordinate authority, no sanction of the Government is necessary. It is needless to point out that under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. Apart from that, as pointed out by me already, a Division Bench of this Court had laid down that the appointing authority in respect of a Village Accountant is the Deputy Commissioner. I am, therefore, of opinion that in the circumstances mentioned above, there is no need to refer the case to a Division Bench.

9. In the result, for the reasons mentioned above, I am of opinion that in the present case, it is not necessary to get the sanction of the State Government under Section 197, Cr. P. C. I, therefore, set aside the order of the Trial Court and direct the learned First Class Magistrate, Raichur, to take the complaint on file and proceed with the case according to law.

Order accordingly.

1970 CRI. L. J. 1116 (Vol. 76, C. N. 276) =

AIR 1970 MYSORE 201 (V 57 C 54)

M. SANTHOSH, J

Ram Singh, Petitioner v. R. Susila Bai and another, Respondents.

Criminal Revn. Petn, No 225 of 1969, D/- 8-1-1970 from order of S. J., Kolar, D/- 30-5-1969.

(A) Hindu Marriage Act (1955), S. 7 — Solemnisation of marriage — Essentials — Invocation before sacred fire and Saptapadi — Absence of either invalidates marriage — AIR 1966 SC 614, Foll.; (1967) 1 Mys LJ 553, Ref. to. (Para 3)

(B) Penal Code (1860), S. 494 — Bigamy — Complaint by first wife against husband — Evidence of ceremonies at time of second marriage discrepant and conflicting — No evidence that saptapadi was performed — Accused is entitled to benefit of doubt. (Para 8)

(C) Evidence Act (1872), S. 3 — Benefit of doubt — Hindu Marriage — No evidence that second marriage was solemnised according to Hindu rites — Accused (Husband) is entitled to benefit of doubt. (Para 8)

Cases Referred: Chronological Paras
(1967) 1967-1 Mys LJ 553 = 1967

Mad LJ (Cri) 526, Laxmavva v.

Hanmappa Bhimappa

3, 7

(1966) AIR 1966 SC 614 (V 53) =

1966 Cri LJ 472, Kanwal Ram v

Himachal Pradesh Administration

3, 6

(1965) AIR 1965 SC 1564 (V 52) =

1965 (2) Cri LJ 544, Bhaurao Shan-

kar Lokhande v. State of Maharash-

tra

3, 4

M. V. Devaraju, for Petitioner, N. A. Mandgi, High Court Govt. Pleader, for Respondent 2.

ORDER:— The Petitioner before this Court was the first accused in the Trial Court. The second accused before the Trial Court was the second wife of the first accused and the complainant in the case was his first wife. The petitioner has been convicted for an offence under Section 494, Indian Penal Code and sentenced to six months rigorous imprisonment by the trial Court. The trial Court also convicted the second accused for an offence under Section 494 read with S. 109, Indian Penal Code. In the appeal filed by the accused the learned Sessions Judge allowed the appeal of the second accused and acquitted her. So far as the appeal filed by the first accused is concerned, the learned Sessions Judge confirmed his conviction and the sentence. In this revision, the petitioner challenges the correctness of the conviction and sentence passed on him by the learned Sessions Judge.

2. The petitioner married the respondent-complainant at Jolarpet about nine years before the complaint. After living for some time with the complainant and after getting

two children, the complainant's case is that the first accused started ill-treating her and drove her out of the house. Thereafter, during the life time of the complainant and while the marriage as between her and the first accused was subsisting, the first accused married the second accused at the premises of one Balaji Singh at Bangarapet on 11-5-1967. The complainant therefore charged the accused with having committed an offence of bigamy under Section 494, Indian Penal Code.

3. Shri M. V. Devaraju, learned counsel appearing on behalf of the petitioner has contended that the complainant has not established that the petitioner has undergone a valid second marriage according to Hindu rites. The contention on behalf of the petitioner is that the second marriage has not been duly solemnised according to Hindu rites and as such it is not a valid marriage. As laid down by the Supreme Court, two things are necessary for solemnisation of a valid Hindu marriage — (1) Invocation before the sacred fire, and (2) Saptapadi. Unless these two ceremonies are performed, the marriage will not be a valid marriage. It is contended by Shri Devaraju that the evidence of the ceremonies performed at the time of the marriage given by the various witnesses is discrepant and conflicting. There is no clear evidence that saptapadi was performed during the ceremony. Shri Devaraju has strongly relied on the decisions in *Bhaurao Shankar Lokhande v. State of Maharashtra*, AIR 1965 SC 1564, *Kanwal Ram v. The Himachal Pradesh Administration*, AIR 1966 SC 614, *Venkata Subbarajudu Chetty v. Tanguturu Venkataiay Shresthi*, (1958) Mad LJ (Cri) 73 and in *Laxmavva v. Hanmappa Bhimappa*, (1967) 1 Mys LJ 553 in support of his contention that no valid marriage had been solemnised.

4. I will first consider what are the legal requirements of a valid Hindu marriage. In AIR 1965 SC 1564, their Lordships have laid down what are the legal requirements of a valid Hindu marriage. In paragraph 5 of the judgment their Lordships have observed as follows —

"The word 'solemnise' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated' or performed with proper ceremonies and due form it cannot be said to be 'solemnised'. It is, therefore, essential for the purpose of Section 17 of the Act, that the marriage to which Section 494, Indian Penal Code, applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom."

4a. Again in paragraph 8 their Lordships have laid down what are the two essential ceremonies which should be performed to make it a valid marriage. At paragraph 8 their Lordships have quoted the passage from Mulla's Hindu Law, 12th Edition, at page 615:—

"(1) There are two ceremonies essential to the validity of a marriage, whether marriage be in the Brahma form or the Asura form, namely—

(1) invocation before the sacred fire, and
(2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

(2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong."

It may be mentioned that the complainant in this case has not relied on any custom of the caste, according to which, by performing certain ceremonies a valid marriage could take place between the parties.

5. In the said decision as the required two essential ceremonies had not been performed, their Lordships set aside the conviction of the accused for an offence under Section 494, Indian Penal Code.

6. Again in AIR 1966 SC 614 their Lordships have reiterated what had been laid down in the earlier decision. Their Lordships held that in a bigamy case, the second marriage as a fact, that is to say, the essential ceremonies constituting it, must be proved and that admission of marriage by the accused was not evidence of it for the purpose of proving marriage in an adultery or bigamy case and that where, therefore, in prosecution for offences under Sec. 494/109 Indian Penal Code the evidence of the witness called to prove the marriage ceremonies, showed that the essential ceremonies had not been performed, the conviction of the accused persons could not be sustained.

7. In (1967) 1 Mys LJ 553 a bench of this Court followed the above mentioned decision of the Supreme Court and held that in a prosecution under Section 494, Indian Penal Code read with Section 17 of the Hindu Marriage Act, the prosecution must establish that the essential ceremonies for a valid marriage were gone through by the accused.

8. I will now examine the evidence let in on behalf of the complainant in the case P. W. 4 Nanjunda Sastry is said to be the Purohit who performed the said marriage. He has nowhere stated that saptapadi was performed at the time of the marriage. All that he has stated is as follows—

"The Homa and the tying of Tali was got performed by me. A-1 tied the Tali to A-2." He has nowhere stated that the essential ceremony of a Hindu valid marriage, that is, saptapadi was performed. He has admitted in cross-examination that he was not a puro-

hit by profession. He has stated that he has been working as a teacher for the last 18 years. He has also admitted that he has not studied Sanskrit and that he does not know how many kinds of marriages there are in Hinduism. It is obviously because of his ignorance of the essential ceremonies that he did not perform Saptapadi while performing the marriage of the accused Nos. 1 and 2. P. W. 2 Samsingh has not stated that there was any invocation before the sacred fire. He has also not stated that accused Nos. 1 and 2 took seven steps together before the sacred fire. P. W. 3 Loku Baiamma has also not spoken to any invocation before the sacred fire.

In cross-examination, she has stated that she does not know the meaning of Saptapadi. Even the evidence of P. W. 5 Jayaram Singh does not indicate that Saptapadi, i.e., seven steps were together taken by the couple round the sacred fire. There is considerable force in the contention of Shri Devaraju that the evidence of the ceremonies performed at the time of the marriage let in by the complainant is discrepant and conflicting. The Purohit who is said to have performed the marriage has nowhere stated that the married couple performed the Saptapadi. It is therefore clear that the complainant has not proved by reliable evidence that the marriage between accused 1 and 2 was solemnised according to Hindu rites. In the state of the evidence mentioned above, the accused is entitled to the benefit of doubt.

9. I, therefore, allow this revision petition and set aside the conviction and sentence passed on the petitioner.

Revision allowed.

1970 ORI. L. J. 1117 (Vol. 76, C. N. 277) =

AIR 1970 PATNA 267 (V 57 C 41)

N. L. UNTWALIA, J

Sarju Ram, Petitioner v. Harihar Ram Tewary and others, Opposite Parties.

Criminal Revn. No 556 of 1969, D/- 24-7-1969

Criminal P. C. (1898), S. 4 (1) (h) — Complaint and a protest petition — Distinction — Separate procedure stated.

If a person is aggrieved by the police investigation or the final report and intends to move the Magistrate for taking cognizance of the offence on the facts stated in the police report or for directing further investigation then it is a protest petition. If he lodges a complaint it should more fully comply with the requirements of Section 4(1) (h). If a protest petition is filed, the Magistrate will dispose of it in the manner he thinks fit

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and proper. If, however, a complaint is filed he is bound to deal with it ordinarily and generally in the first instance by examining the complainant on solemn affirmation under Section 200 and thereafter by passing any of the following 3 orders, viz. (i) to dismiss it summarily, (ii) to issue processes straightway or (iii) to order an inquiry as envisaged in S. 202 AIR 1968 SC 117, Rel on. (Para 4)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 117 (V 55) =

1967-3 SCR 668, Abhinandan Jha

v. Dinesh Mishra

(1919) AIR 1919 Pat 530 (V 6) =

20 Cri LJ 389, Emperor v

Makund Patel

Braj Kishore Prasad II and Kamal Nayan Choubey, for Petitioner; Sushil Kumar Mazumdar, for Opposite Parties

ORDER:— According to the case of the petitioner, the opposite parties committed various kinds of offences in that they illegally arrested him and kept him under wrongful confinement under chain and handcuffs for a period of about 2 months commencing from the 29th of May, 1966 and ending on the 23rd of July, 1966. It is not necessary for me to state the facts in any detail. Suffice it to say that according to the case of the petitioner, when he was rescued by the police on 23-7-1966 from the wrongful confinement, he made a statement upon which a case was instituted and first information report was drawn up. In the said case being Birni P S Case No 4 (7) 66 under Sections 147, 344 and 365 of the Penal Code after investigation the police submitted a final report on 9-1-1967. On the same date the petitioner filed a petition in the Court of the Sub-divisional Magistrate, Gridih. It is necessary to quote the contents of that petition in full—

"The humble petition of protest on behalf of the informant Sarju Ram against the F R in this case

Most respectfully sheweth:

(1) That the police has submitted Final report false in this case

(2) That the case of the informant was true. He was recovered by the D I Police from the house of the accused

(3) That the police has submitted F R false in collusion with the accused who are moneyed and influential men

(4) That a Judicial inquiry is necessary

(5) That other grounds will be urged at the time of hearing

In the circumstances it is earnestly prayed that your honour would be pleased to refuse to accept the F R and order a judicial inquiry

And for this act of kindness the informant shall ever pray "

2. The learned Sub-divisional Magistrate, by his order dated 6-4-1967, ac-

cepted the police report and discharged the accused from the operation of the bail bond. The petitioner filed Criminal Revision No. 31 of 1967 which was dismissed by the learned Additional Sessions Judge, 2nd Court, Hazaribagh. The learned Additional Sessions Judge also took the view that there was no illegality or irregularity committed by the learned Magistrate in accepting the final report submitted by the police. The petitioner has come up in revision to this Court.

3. The submission on behalf of the petitioner is that the protest petition filed by him on 9-1-1967 ought to have been treated as a petition of complaint, he ought to have been examined on solemn affirmation in accordance with Sec 200 of the Code of Criminal Procedure (hereinafter called the Code) and thereafter the petition ought to have been dealt with in accordance with the other sections occurring in Chapter XVI of the Code. The contention on behalf of the opposite party is that the petition filed by the petitioner on 9-1-1967 was not a petition of complaint either in form or in effect or substance and hence the learned Sub-divisional Magistrate committed no error in not treating it as such.

4. Filing of the protest petitions in relation to investigation of a case instituted at a police station, if the investigation or the report by the police goes against the informant, has not been an unusual feature in this State. On the filing of a protest petition, generally 3 kinds of orders have followed. In some cases, Investigating Officer was directed to file a charge-sheet if on examining the materials and the case diary the Sub-divisional Magistrate was satisfied that the case was such that a charge-sheet should be submitted, in some cases further investigation was ordered and in some the protest petition has been treated as a petition of complaint, the persons filing the protest petition at times have been examined on solemn affirmation and then the petition has been disposed of in accordance with the provision of law contained in Chapter XVI of the Code. The Supreme Court in Abhinandan Jha v Dinesh Mishra, AIR 1968 SC 117 has pointed out that the Magistrate has no power to call for a charge-sheet. If upon submission of the report by the police, which, if it is in favour of the accused, is commonly called a final report, the Magistrate thinks that on the facts stated in the report an offence is made out, he can take cognizance of the offence even though in the concluding portion of the report the police recommended that no action should be taken. If the Magistrate be of the opinion after considering the final report that the investigation is unsatisfactory or incomplete or that there is scope for further investigation, it is open to the Magistrate to decline to accept the

final report and direct the police to make further investigation under Section 156 (3) of the Code. It has, however, been definitely laid down by the Supreme Court in the case of Abhinandan Jha, AIR 1968 SC 117 referred to above that the Magistrate has no power to direct the police to submit a charge-sheet. In my opinion, therefore, if a person is aggrieved by the police investigation or the final report and intends to move the Magistrate for taking cognizance of the offence on the facts stated in the police report or for directing further investigation then and then only in the proper sense of the term the petition filed by him should be characterised as a protest petition. If he intends to move the Magistrate by way of lodging a complaint before him then it is advisable and expedient that he should file a petition which should more fully comply with the requirements of S. 4(1) (h) of the Code. If a protest petition in the sense I have explained is filed, it will be for the Magistrate to dispose it of in the manner he thinks fit and proper. If, however, a petition is filed with a view to ask the Magistrate to proceed with the case as a complaint case, he should deal with that petition ordinarily and generally in the first instance by examining the complainant on solemn affirmation in accordance with Section 200 of the Code and thereafter by passing any of the 3 orders which he has power to pass, namely, (i) to dismiss it summarily, (ii) to issue processes straightway or (iii) to order an inquiry as envisaged in Section 202 of the Code.

5. In the petition filed by the petitioner on 9-1-1967, as has been often the practice in this State, he has made reference to what happened before the police. He has stated that he was recovered by the Divisional Inspector of Police from the house of the accused and after stating that a judicial inquiry is necessary, the prayer made is to refuse to accept the final report and order a judicial inquiry. I am, therefore, inclined to take the view that although the first portion of the prayer was superfluous in that there was no question of refusing to accept the final report as submitted by the police, the second portion of the prayer was with a view to ask the Magistrate to take action under the Code—presumably under Section 202. This view of mine finds some support from a decision of this Court reported in *Emperor v. Makund Patel*, 20 Cri LJ 389 = (AIR 1919 Pat 530). But as I have indicated my view earlier, that the persons aggrieved by the police investigation or the final report should be more cautious in choosing the language and the type of their petition which they intend to file before the Sub-divisional Magistrate, I think the petition filed by the petitioner on 9-1-1967 is not a complete petition of complaint. The proper order, therefore,

in my opinion, to be made in this case is as stated below.

6. The order dated 6-4-1967 of the learned Sub-divisional Magistrate, Giridih, accepting the final report of the police is not being interfered with as it is not necessary to be interfered with. He is, however, directed to allow an opportunity to the petitioner to file a supplementary petition of complaint stating the facts more fully and bringing it more explicitly in accord with the requirements of the petition of complaint. If and when such a petition is filed, it is to be treated as being supplemental to, and a part of, the petition filed on 9-1-1967. In other words, both the petitions together will be treated as a full-fledged petition of complaint and then the petitioner will be examined on solemn affirmation. After his examination, it will be open to the Sub-divisional Magistrate to pass any of the 3 orders, which he is entitled to pass, as stated in my judgment earlier. I must not be supposed to have expressed any view in regard to the merit of the case one way or the other by any observation of mine in this judgment.

7. The application in revision is accordingly allowed in part to the extent and in the manner indicated above.

Revision partly allowed.

1970 CRI. L. J. 1119 (Vol. 76, C. N. 278) =
AIR 1970 PUNJAB AND HARYANA 351

(V 57 C 57)

FULL BENCH

HARBANS SINGH, JINDRA LAL AND
A. D. KOSHAL, JJ.

Ajit Singh, Appellant v State of Punjab, Respondent.

Criminal Appeal No. 1215 of 1968 and Murder Ref. No. 3 of 1969, D/- 28-1-1970

(A) Air Force Act (1950), S. 9 — Power to declare persons to be on active service — Notification under, declaring that all persons subject to the Act shall "wherever they may be serving" be deemed to be on active service — Phrase "wherever they may be serving" would cover not only persons actually engaged in performing duties of their respective offices on date of the commission of offence alleged against them but also the persons on leave from Air Force at relevant point of time — 'Serving' would mean holding employment as distinguished from actually performing duties of service. (Paras 19, 21)

(B) Words and Phrases — Word 'serving' — It must be construed in wider sense in which a person employed by another is said to be serving him merely

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by reason of relationship created by employment. (Para 19)

(C) Criminal P. C. (1898), S. 549 — Rules under — Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules (1952), R. 3 — Delivery to Military authorities of persons liable to be tried by Court-martial — Conflict of jurisdiction between Magistrate and Air Force authorities — Inherent jurisdiction of Magistrate is not taken away by any provisions of Air Force Act and of S. 549, Cr. P. C. and rules made thereunder — S. 549 and rules framed thereunder merely regulate the exercise by Magistrate of the jurisdiction already vested in him and cannot be treated as directions to be followed by Magistrate before he can "acquire" jurisdiction. (1969) 71 Pun LR (D) 61 (FB); AIR 1969 SC 414 & AIR 1961 SC 1762, Foll; AIR 1967 Cal 323 & (1949) 2 Mad LJ 44 & AIR 1945 Mad 289 & AIR 1945 Bom 176, held not good law in view of AIR 1961 SC 1762. (Para 22)

(D) Air Force Act (1950), S. 71 — Civil Offences — Act does not bar inherent jurisdiction of Criminal Court: AIR 1961 SC 1762, Foll; AIR 1967 Cal 323 & (1949) 2 Mad LJ 44 & AIR 1945 Mad 289 & AIR 1945 Bom 176, held not good law in view of AIR 1961 SC 1762. (Para 22)

(E) Criminal P. C. (1898), S. 549 — Delivery to Military authorities of persons liable to be tried by Court martial — Non-compliance with S. 549 and rules made thereunder — Whether trial would be illegal or mere irregularity not vitiating it, would depend on circumstances of each particular case — Accused a member of Air Force, produced before committing Magistrate — Fact that he was in service of Air Force brought to notice of Magistrate only at time of recording his plea after framing charge against him and in sessions Court at time of examination under S. 342, Cr. P. C. after closing of evidence at trial — Apart from that there was no material before those courts that the accused had anything to do with Air Force or that he was on active service — Failure of Courts in not observing provisions of S. 549 and rules made thereunder held not amounted to illegality vitiating trial especially as no prejudice caused to accused — It was a mere irregularity curable under S. 537. 1969-71 Pun LR (D) 61 (FB), Foll. (Para 25)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 414 (V 56) =
1969 Cri LJ 663 Som Datt Datta
v Union of India 22
(1969) 1969-71 Pun LR (D) 61 (FB),
Joginder Singh v State 15, 22, 23, 25
(1967) AIR 1967 Cal 323 (V 54) =
1967 Cri LJ 741, Awadh Behari
Singh v. State 11, 22

(1961) AIR 1961 SC 1762 (V 48) =
1961 (2) Cri LJ 828, Major E. G.
Barsay v. State of Bombay 15, 22, 23
(1956) ILR (1956) Bom 392 = 58
Bom LR 157, State v. Dattatraya
Tulsiram Bhujbal 20
(1945) AIR 1945 Cal 340 (V 32). =
47 Cri LJ 125, Amarendra Chandra
Chakravorty v. Garrison Engi-
neer 13, 22, 23
(1949) 1949-2 Mad LJ 44, Re
Major F. K. Mistry 12, 22
(1945) AIR 1945 Bom 176 (V 32) =
46 Cri LJ 99, Emperor v Jerry
D. Sena 13, 22
(1945) AIR 1945 Mad 289 (V 32) =
47 Cri LJ 192, In Re. Captain
Hugh May Stollery Mudy 10, 22
M/s A. S. Anand and Harparshad with
K. D. Singh, for Appellant, A. S. Bains,
Dy. Advocate-General (Punjab) with N.
S. Chhachhi, R. L. Batta, for Complainant,
for Respondent

ORDER OF REFERENCE

1. Ajit Singh alias Gurjeet Singh son of Harbans Singh of village Asal Autar has been sentenced to death on three counts under Section 302, Indian Penal Code. He has been further convicted under Section 307, Indian Penal Code, on eleven counts and sentenced to undergo rigorous imprisonment for seven years on each count. His co-accused, i.e., Ajit Singh son of Sohan Singh, Harbhajan Singh alias Dayal Singh, Gurbax Singh and Pala Singh, who were tried with Ajit Singh alias Gurjeet Singh for constructive liability for the offences for which Ajit Singh has been convicted, were given the benefit of the doubt by the learned Additional Sessions Judge and were acquitted.

2. During the pendency of this appeal and Murder Reference, the Public Prosecutor made an application under Sections 428 and 561-A, Criminal Procedure Code, for additional evidence and personal appearance of the appellant in view of a ground taken by the appellant in the grounds of appeal that in any case in the circumstances of the case capital punishment was not called for. This was on account of some dispute raised with regard to the age of Ajit Singh. In the meantime additional grounds of appeal were submitted to this Court by Ajit Singh through jail. These were forwarded by the Superintendent, Central Jail, Amritsar, on the 25th of July, 1969. In the additional grounds of appeal it was urged that at the time of the commission of the offence the appellant was LAC in the Air Force and was on active service although on leave, and that under Section 549, Criminal Procedure Code, and Rule 3 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952, it was incumbent upon

the Committing Magistrate and the learned Additional Sessions Judge to inform the competent air force authority in writing about the case against the appellant and to enquire, before proceeding with the appellant's case whether the said authority wanted to claim the appellant for trial by Court Martial. It was maintained that the provisions of Rule 3 of Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952, not having been complied with, the trial was vitiated.

3. While we were hearing the appeal on the 14th of August, 1969, it was pointed out that there was no evidence on the record of this case on the basis of which it could be asserted that the appellant at the time of the incident was in the Air Force so as to entitle him to trial by Court Martial. The hearing was adjourned to enable learned counsel for the appellant to place before this Court, if he was so advised, evidence by way of affidavit or otherwise in order to lay the basis for the ground taken before us. In view of the importance of the law point involved we directed the learned Advocate-General to assist us in this matter himself.

4. We have heard learned counsel for the parties. Learned counsel for the appellant has pointed out the provisions of Section 549, Criminal Procedure Code. This section provides for delivery to military authorities of persons liable to be tried by Court Martial and is in the following terms:—

"(1) The Central Government may make rules, consistent with this Code and the Army Act, the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934 and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law shall be tried by a Court to which this Code applies, or by Court Martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, to be tried either by a Court to which this Code applies, or by a Court-Martial such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by Court-Martial.

(2) Every Magistrate shall, on receiving written application for that purpose by the commanding officer of any body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence."

Attention was also drawn to the Air Force

Act, 1950. Section 2 of the Air Force Act, 1950, is in the following terms:—

"The following persons shall be subject to this Act wherever they may be, namely:—

- (a) officers and warrant officers of the Air Force;
- (b) persons enrolled under this Act;
- (c) persons belonging to the Regular Air Force Reserve or the Air Defence Reserve or the Auxiliary Air Force, in the circumstances specified in Sec. 26 of the Reserve and Auxiliary Air Forces Act, 1952;
- (d) persons not otherwise subject to air force law, who, on active service, in camp, on the march, or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of the Air Force."

Section 4(i) of the Air Force Act specifies persons who are deemed to be on 'active service' as under:—

"'active service' as applied to a person subject to this Act, means the time during which such person—

- (a) is attached, or forms part of, a force which is engaged in operations against an enemy, or
- (b) is engaged in air force operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or
- (c) is attached to, or forms part of, a force which is in military occupation of any foreign country."

Section 9 gives power to the Central Government to declare persons to be on active service by a notification and is in the following terms. —

"Notwithstanding anything contained in clause (i) of Section 4, the Central Government may, by notification, declare that any person or class of persons subject to this Act shall, with reference to any area in which they may be serving or with reference to any provision of this Act or of any other law for the time being in force, be deemed to be on active service within the meaning of this Act"

5. Attention was also drawn to the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, more particularly to Rules 3, 4, 5 and 6 which are in the following terms —

"3. Where a person subject to military, naval or air force is brought before Magistrate and charged with an offence for which he is liable to be tried by a Court-Martial, such Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless—

- (a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or air force authority, or
- (b) he is moved thereto by such authority.

4 Before proceeding under Clause (a) of Rule 3, the Magistrate shall give a written notice to the Commanding Officer of the accused and until the expiry of a period of—

(1) three weeks, in the case of a notice given to a Commanding Officer in command of a unit or detachment located in any of the following areas of the hill districts of the State of Assam, that is to say—

- (1) Mizo,
- (2) Naga Hills,
- (3) Garo Hills,
- (4) Khasi and Jaintia Hills, and
- (5) North Cachar Hills;

(ii) seven days in the case of a notice given to any other Commanding Officer in command of a unit or detachment located elsewhere in India, from the date of service of such notice, he shall not

- (a) convict or acquit the accused under Section 243, 245, 247 or 248 of the Code of Criminal Procedure 1898 (Act 5 of 1898), or hear him in his defence under Sec. 244 of the said Code; or
- (b) frame in writing a charge against the accused under Sec 254 of the said Code; or
- (c) make an order committing the accused to trial by the High Court or the Court of Session under S. 213 of the said Code; or
- (d) transfer the case for inquiry or trial under Sec. 192 of the said Code

5 Where within the period of seven days mentioned in Rule 4, or at any time thereafter before the Magistrate has done any act or made any order referred to in that rule, the Commanding Officer of the accused or competent military, naval or air force authority, as the case may be, gives notice to the Magistrate that in the opinion of such authority, the accused should be tried by a Court-Martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section (1) of Sec 549 of the said Code to the authority specified in the said sub-section

6. Where a Magistrate has been moved by competent military, naval or air force authority, as the case may be, under Cl (b) of Rule 3, and the Commanding Officer of the accused or competent military, naval or air force authority, as the case may be, subsequently gives notice to such Magistrate that, in the opinion of such authority, the accused should be

tried by a Court-Martial, such Magistrate, if he has not before receiving such notice done any act or made any order referred to in Rule 4, shall stay proceedings and, if the accused is in his power or under his control, shall in the like manner deliver him, with the statement prescribed in sub-section (1) of Sec. 549 of the said Code to the authority specified in the said sub-section"

It is not disputed that the Central Government issued on the 5th of December, 1962, a notification No. S R O. 8-E in the following terms:—

"In exercise of the powers conferred by Section 9 of the Air Force Act, 1950 (45 of 1950), the Central Government hereby declares that all persons subject to the said Act, shall, wherever they may be serving, be deemed to be on active service within the meaning of the said Act for the purposes of the said Act and of any other law for the time being in force."

Section 124 of the Air Force Act, 1950, provides that when a Criminal Court and a Court-Martial have each jurisdiction in respect of an offence, it shall be in the discretion of the Chief of the Air Staff, the officer commanding any group, wing or station in which the accused prisoner is serving or such other officer as may be prescribed to decide before which Court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a Court-Martial, to direct that the accused person shall be detained in Air Force custody. Sec 125 of Air Force Act is in the following terms:—

"(1) When a criminal Court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 124 at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the Court before which the proceedings are to be instituted for the determination of the Central Government whose order upon such reference shall be final"

Section 71 of the Air Force Act is in the following terms:—

"Subject to the provisions of Sec 72, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Court

Martial and, on conviction, be punishable as follows, that is to say,—

- (a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and
- (b) in any other case, he shall be liable to suffer any punishment other than whipping assigned for the offence by any law in force in India, or imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."

Section 72 of the said Act is in the following terms:—

"A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Court-Martial, unless he commits any of the said offences—

- (a) while on active service, or
- (b) at any place outside India, or
- (c) at a frontier post specified by the said Government by notification in this behalf.

Explanation — In this section and in Section 71 "India" does not include the State of Jammu and Kashmir."

6. It is the contention on behalf of the appellant that in view of the provisions mentioned above, the appellant must be deemed to be on active service although he was on leave and consequently the offence was triable by a Court-Martial and since no information was given to the appropriate officer to enable him to claim that the appellant should be tried by Court-Martial, his trial is vitiated and he is entitled to acquittal.

7. It seems to be fairly clear that neither the learned Magistrate who committed the accused for trial nor the learned Additional Sessions Judge gave any notice to the appropriate officer requiring to exercise his option as contemplated by law. Before the Committing Magistrate nothing was disclosed which would indicate to him that the appellant was in the Air Force. It is only when the charge was framed against the appellant and his plea was taken that the appellant stated his age to be 18 years and service in I.A.F. When examined under the provisions of Section 342, Criminal Procedure Code, at the trial he stated that he was an employee of the Indian Air Force. Apart from these, there was no other material on the record during the trial

that the appellant had anything to do with the Air Force.

8. An affidavit has, however, been produced before us sworn by Wing Commander K. S. Suri dated 20th of August, 1969, wherein it is stated that Leading Aircraftman Gurjeet Singh son of Harbans Singh is an Airman who is on the posted strength of his Unit with effect from 9th of July, 1966, having been enrolled in the Air Force on the 4th of October, 1963, and after the 5th of December, 1962, he was on active service in the Air Force vide declaration by the Central Government dated 5th of December, 1962 (Notification S.R.O. 8-E dated 5th of December, 1962).

9. Before us learned counsel for the appellant has urged that in view of non-compliance with Section 549, Criminal Procedure Code, read with the rules made thereunder, the trial is vitiated because these provisions were mandatory in nature. To support his contention he has relied upon some authorities

10. In re: Captain Hugh May Stollery Mundy, AIR 1945 Mad 289, it was held by a Division Bench that where the attention of the Magistrate who tried the accused was not drawn to Section 549, Criminal Procedure Code, or the rules framed thereunder and he did not act in accordance therewith, the trial was illegal and the conviction and sentence must be set aside. In this case the accused was an engine-room mechanic who had been sentenced to three months' rigorous imprisonment for an offence under Section 304-A, Indian Penal Code, and rigorous imprisonment for one month under Section 116, Motor Vehicles Act.

11. In Awadh Behari Singh v The State, AIR 1967 Cal 323, it has been held that when the mandatory provisions of Section 549, Criminal P. C. and the rules made thereunder are not complied with, the procedural defect is not merely an irregularity but is an illegality, which affects the jurisdiction of the Magistrate in the trial Court and in such a case the conviction and sentence passed against the accused must be set aside. It was further held that Rule 3 of Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, framed under Section 549, Criminal Procedure Code, must be strictly complied with before a military personnel can be tried by a Magistrate, as it provides the jurisdiction of the Magistrate to try such personnel. In that case a Naik of the Indian Army was prosecuted under the Opium Act. The Company Commander, the competent military authority, wrote a "confidential" letter to the Deputy Commissioner of Excise asking him to try the accused under the civil law. This letter was made available to the Magistrate for

trying the accused under Section 549, Criminal Procedure Code, and the accused was convicted. The Division Bench of the Calcutta High Court set aside this conviction.

12. In Re: Major F. K. Mistry, (1949) 2 Mad LJ 44 it has been held that—

"Where the Court fails in its duty to give notice to the commanding officer of the accused, the proceedings before the Magistrate relating to the recording of evidence, etc., would be illegal and without jurisdiction, and acquiescence on the part of the accused in an irregular or illegal proceeding would not regularise or legalise the proceedings. A charge so framed would be without jurisdiction and has to be quashed."

13. Two other authorities were relied upon Emperor v. Jerry D Sena, AIR 1945 Bom 176 and Amarendra Chandra Chakravorty v. Garrison Engineer, AIR 1945 Cal 340.

14. The State relied upon Major E. G. Barsay v. State, AIR 1958 Bom 354. That was a case where one E. G. Barsay and others were tried before a Special Judge set up under the Criminal Law Amendment Act. It was held that it cannot be said that the rules framed under Sec 549, Criminal Procedure Code, will have to be followed by a Special Judge. It will be seen that this case hardly helps the State.

15. Reliance was mainly placed upon a judgment of the Full Bench of the Delhi High Court in Joginder Singh v. State, 1969-71 Pun LR (Delhi Section) 61 (FB). Dua, C J (as he then was) and Tatachari, J came to the conclusion that violation of Rules 3 and 4 of the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules framed under Section 549, Criminal Procedure Code, does not by itself deprive the Magistrate of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and that the effect of the violation is to be determined on the facts and circumstances of each case keeping in view the nature of the violation and all other relevant factors. They relied upon the observations made by their Lordships of the Supreme Court in Major E. G. Barsay v. State of Bombay, AIR 1961 SC 1762, S. K. Kapur J., however came to a contrary conclusion and held that the observance of the above rules was obligatory and non-observance thereof will result in an illegality vitiating the trial.

16. The points raised in this appeal and Murder Reference are of considerable importance. These points were not raised in some of the appeals which had been previously disposed of in this Court where Army and Air Force personnel had been convicted by the lower Court and we, therefore, consider that this is a fit case which should be heard by a larger

Bench. We, therefore, direct that the papers of this case be placed before Hon'ble the Chief Justice for constituting a larger Bench. In view of the fact that the appellant has been sentenced to death, this case be heard at a very early date.

17. A. D. KOSHAL, J.: I agree.

ORDER OF THE FULL BENCH.

18. A. D. KOSHAL, J.: The facts giving rise to this reference, along with the relevant provisions of law, are fully set out in the referring order dated the 2nd of September, 1969, (which shall be treated as part of this judgment) and need not be repeated here. I shall start directly with a discussion of the points requiring determination.

19. The first such point was raised on behalf of the State with the argument that on the day of the occurrence the appellant being on leave from his Unit, he could not be said to be on "active service" within the meaning of Notification No. S.R.O. 8-E dated the 5th of December, 1962 (supra) issued by the Central Government under Section 9 of the Air Force Act, 1950 (hereinafter to be referred to as the Act). It is urged that the words "wherever they may be serving" forming part of the notification would cover only such persons as at the relevant point of time are actually engaged in performing the duties of their respective offices. This argument, which gives a restricted meaning to the word "serving", is unacceptable to us. In our opinion, the word must be construed in the wider sense in which a person employed by another is said to be serving him merely by reason of the relationship created by the employment. The word is not defined in the Act. Webster's Third New International Dictionary (1961 Edition) gives, inter alia, the following meaning of the word "serve".

"to be a servant: become employed in domestic service, at manual labour, or upon another's business: * * *
to do service * * *
to do military or naval service: be a soldier or sailor *
to hold an office: discharge a duty or function: act in a capacity *"

According to Corpus Juris Secundum (1952 Edition), Vol LXXIX, the general meaning of the word "serve" is to perform service, and—

"The word 'service' has a multiplicity and a variety of meanings and different significations. It is not a simple word with a simple meaning, leaving no room for construction, but rather it is a broad term of description, which varies in meaning according to the sense in which it is used and the context in which it is found, and the sense in which it is used must be determined from the context. Thus the Courts have found it impracticable to attempt a definition by which to

test every case that may arise" .
It is further stated

"The word 'service' is also defined as meaning the being employed to serve another, the position of a servant; the state of being a servant; the occupation, condition, or status of a servant; the work of a servant; the work of a slave, hired man, or employee; the attendance of an inferior, hired helper, slave, etc."

There is thus no doubt that in one sense the word "serving" used in the notification would mean holding employment as distinguished from actually performing the duties of service and it is in that sense, I think, that the word has been used. It is not disputed that if the appellant had actually been with his Unit at the time of the occurrence but had been off duty otherwise than while on leave, he would, though not discharging the functions of his office, fall within the ambit of the phrase "wherever they may be serving". If that be so, the restricted meaning sought to be given on behalf of the State to the phrase just mentioned cannot be accepted as that in which the Legislature used the phrase.

20. Reliance on behalf of the State was placed on State v. Dattatraya Tulshiram Bhujbal, ILR (1956) Bom 392, in which a Naval Rating was committed for trial to the Court of Session for an offence under Section 366, of the Indian Penal Code on the 24th of February, 1959, when he was admittedly on leave of absence in the Poona District. According to the learned Sessions Judge, the Committing Magistrate, in passing an order of committal, had ignored the provisions of Section 549 of the Code of Criminal Procedure and the rules framed thereunder. He, therefore, referred the case to the High Court for quashing the order of commitment. Rejecting the reference, Shah and Vyas, JJ, observed with regard to a contention that the conduct of the accused in abducting the victim of the rape might be regarded by the Naval authorities as prejudicial to good naval discipline, that it would be open to them to charge the accused for an offence under Section 43 of the Indian Navy (Discipline) Act, XXXIV of 1934, and that if they so regarded the conduct of the accused the ordinary tribunals of the State could have no jurisdiction to try him for the offence of rape;

"In our view, there is no substance in that contention. Section 43 of the Act provides a penalty for any act, disorder or neglect to the prejudice of good order and naval discipline which is not specified in Sections 2 to 42. In order that an act, disorder or neglect may be regarded as prejudicial to good order and discipline, it must have some direct relation to the duty which is required to be performed by a person subject to Naval duty. In

the present case the accused was on leave and he was not discharging any duty at the time of the commission of the offence. Every immoral act may in a larger sense be regarded as an act to the prejudice of good order or naval discipline but we do not think that the Legislature intended by enacting Section 43 which penalises 'miscellaneous offences' to render every act done by a person subject to Naval law, which may be regarded as an offence under the ordinary law of the land, or which may be regarded as contrary to good morals, punishable under Section 43. Section 43, in our judgment, is intended to punish acts, disorders or neglects which tend to prejudice good order and naval discipline, and it is necessary that at the time of doing the act or being guilty of disorder or neglect the offender was on active duty.

As the accused was at the time of the alleged commission of the offence not on active duty, we are unable to hold that the conduct of the accused falls within the terms of Section 43 of the Indian Navy (Discipline) Act, XXXIV of 1934." This authority is of no help to the contention raised on behalf of the State inasmuch as the provisions of Section 43 above-mentioned which are set out below have no relation to the language employed in and the substance of the notification in question

"43. Every person subject to this Act who shall be guilty of any act, disorder or neglect to the prejudice of good order and naval discipline not hereinbefore specified shall be dismissed from His Majesty's service, with disgrace, or suffer such other punishment as is hereinafter mentioned"

21. In view of what I have already said, I would hold that the appellant was on active service within the meaning of the said notification on the date of the commission of the offences alleged against him, in spite of the fact that he was on leave from the Air Force.

22. The next question calling for decision arises from the non-observance of the provisions of Section 549 of the Code of Criminal Procedure and the rules framed thereunder. It is urged on behalf of the appellant that his committal and the trial held in pursuance thereof must be held to be without jurisdiction. According to his learned counsel, the Magistrate had no jurisdiction to begin with, and that he could acquire jurisdiction only after a decision in his favour had been given by the Central Government in the case of a conflict between the army authorities and the Magistrate. Reliance for the contention is placed on the authorities cited in that behalf in the order of reference. In my view, however, none of those authorities can be said to have been correctly decided in view

of the following observations of their Lordships of the Supreme Court in AIR 1961 SC 1762, in relation to the provisions of the Army Act, 1950:

"The scheme of the Act therefore is self-evident. It applies to offences committed by army personnel described in Section 2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offences under the Act; it provides a satisfactory machinery for resolving the conflict of jurisdiction. Further it enables, subject to certain conditions, an accused to be tried successively both by court-martial and by a criminal court. It does not expressly bar the jurisdiction of criminal courts in respect of acts or omissions punishable under the Act, if they are also punishable under any other law in force in India, nor is it possible to infer any prohibition by necessary implication. Sections 125, 126 and 127 exclude any such inference, for they in express terms provide not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of the same offence, but also provide for successive trials of an accused in respect of the same offence.

Though the offence of conspiracy does not fall under Section 52 of the Act, it, being a civil offence, shall be deemed to be an offence against the Act by the force of Section 69 of the Act. With the result that the offences are triable both by an ordinary criminal court having jurisdiction to try the said offences and a court-martial. To such a situation Sections 125 and 126 are clearly intended to apply. But the designated officer in Section 125 has not chosen to exercise his discretion to decide before which court the proceedings shall be instituted. As he has not exercised the discretion, there is no occasion for the criminal court to invoke the provisions of Section 126 of the Act, for the second part of S 126(1), which enables the criminal court to issue a notice to the officer designated in Section 125 of the Act to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government, indicates that the said sub-section presupposes that the designated officer has decided that the proceedings shall be instituted before a court-martial and directed that the accused person shall be detained in military custody. If no such decision was arrived at, the Army Act could not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law."

It may be noted here that Sections 125,

126 and 127 of the Army Act make provisions for army personnel exactly similar to those which Sections 124, 125 and 126 of the Act make in respect of members of the Air Force so that the observations just quoted are applicable mutatis mutandis to the latter set of sections and it must be held that when Section 549 of the Code of Criminal Procedure comes into play in the case of a member of the Air Force, it cannot be said that a Magistrate before whom he is produced would not have jurisdiction to take cognizance till the procedure laid down in the rules framed under the section has been gone through and the necessary order of the Central Government obtained in the case of a conflict between the Magistrate and the Air Force authorities. In view of the observations just above quoted, it must be held that the Air Force Act does not stand in the way of the Magistrate "exercising his ordinary jurisdiction in the manner provided by law". The result is that Section 549 above-mentioned and the rules framed thereunder must be looked upon as provisions which merely regulate the exercise by the Magistrate of that jurisdiction which already vests in him and cannot be treated as directions which must be followed by the Magistrate before he can "acquire" jurisdiction. This was also the view taken by a majority (Dua C J and Tatachari J) in 1969-71 Pun LR (Delhi Section) 61 (FB) on a detailed consideration of various provisions of the Army Act and the above quoted observations of their Lordships of the Supreme Court.

In *Som Datt Datta v. Union of India*, AIR 1969 SC 414, the above view of the provisions of Sections 125 and 126 of the Army Act was reiterated in the following words:

"The legal position therefore is that, when an offence is for the first time created by the Army Act, such as those created by Sections 34, 35, 36, 37, etc., it would be exclusively triable by a court-martial, but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary criminal court as well as a court-martial would have jurisdiction to try the person committing the offence. Such a situation is visualized and provision is made for resolving the conflict under Sections 125 and 126 of the Army Act, * * * * Section 125 presupposes that in respect of an offence both a criminal court as well as a court-martial have each concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the

discretion of the officer mentioned in Section 125 to decide before which court the proceedings shall be instituted, and, if the officer decides that they should be instituted before a court-martial, the accused person is to be detained in military custody; but if a criminal court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice under Section 126 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question of proper court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation in any particular case."

No room is left for doubt about the legal position being that the inherent jurisdiction which a Magistrate has to take cognizance of civil offences under the Code of Criminal Procedure is not taken away by any provisions of the Army Act (and, therefore, of the Air Force Act), and of Section 549 of the Code of Criminal Procedure and the rules made thereunder. What those provisions envisage is concurrent jurisdiction in the criminal Courts and the courts-martial and an arrangement for the proper exercise of such jurisdiction including, when necessary, a way of resolving a conflict of jurisdiction. AIR 1967 Cal 323 and (1949) 2 Mad LJ 44, which take a contrary view, cannot be accepted as laying down good law. In AIR 1945 Mad 289, there is no discussion of the relevant provisions of law and all that is said is:

"The attention of the Magistrate who tried the accused was not drawn to Section 549, Criminal P. C., or the rules framed thereunder, and he did not act in accordance therewith. Consequently, the trial was illegal and the conviction and sentence must be set aside."

If by the finding that the trial was illegal is meant that it was vitiated by inherent lack of jurisdiction, this authority must be held to have been overruled by AIR 1961 SC 1762 (supra) and the same would be true of AIR 1945 Bom 176, which takes a view similar to that adopted in the Madras case.

23. I may also state here that AIR 1945 Cal 340 is one of the cases mentioned in (1969) 71 Pun LR (D) 61 (FB) (supra) as laying down the law incorrectly in view of the verdict of the Supreme Court in AIR 1961 SC 1762 (supra). I have not been able to lay my hands on this authority which appears to have been miscited as AIR 1945 Cal 340. Reliance for the ap-

pellant, however, was placed mainly on the dissenting judgment of Kapur, J., in (1969) 71 Pun LR (D) 61 (FB) the following observations wherefrom have been quoted with emphasis:

"From the above discussion what emerges is this that under the Army Act as well as the Rules the first option lies with the army authorities to decide the forum of trial. The Magistrate gets jurisdiction only after a decision in his favour by the Central Government in case of a conflict between the army authorities and the Magistrate. To my mind, it clearly appears that a Magistrate cannot assume jurisdiction straightway unless the army authorities have had an opportunity of deciding upon the forum. No doubt, the Magistrate can try again the accused person convicted or acquitted by the court-martial but that too can be done with the previous sanction of the Central Government."

These observations no doubt lend great support to the case of the appellant but if I may say so with the greatest respect, they do not lay down the law correctly in view of the interpretation placed by their Lordships on the various relevant provisions of law. I may mention in this connection that while the majority of the Judges of the Full Bench were at pains to take note of and follow the observations of the Supreme Court decision in AIR 1961 SC 1762 (supra) not a mention of that decision was made by Kapur, J., whose judgment runs counter thereto and cannot be regarded as laying down the law correctly in view of what I have already said.

24. I would accordingly hold that the contention raised on behalf of the appellant that the trial was vitiated by lack of jurisdiction in the Magistrate and the learned Additional Sessions Judge must be rejected as untenable.

25. Another point raised on behalf of the appellant is that the trial was in any case vitiated by the illegality which cannot, according to him, be considered as a mere irregularity, arising from the Magistrate not following the procedure prescribed by Section 549 of the Code of Criminal Procedure and the rules framed thereunder. In this point also I find no substance. Neither the Magistrate nor the learned Additional Sessions Judge was apprised of the facts which would make the said provisions applicable. It is not disputed that neither the policy of the law nor the object underlying the legal provisions just above-mentioned would appear to make it incumbent on every criminal Court taking cognizance of an offence to start with an enquiry as to whether the accused before it is or is not a person subject to Military, Naval or Air Force Law and also one to whom those provisions would apply. Nor could it be

intended that an accused person could take the benefit of those provisions after he had gone through a trial ending in a conviction by the ordinary Criminal Court and thus get a chance to have the best of both worlds. It would, therefore, depend on the circumstances of each particular case as to whether a trial held in breach of the said provisions would be considered illegal and, therefore, liable to be quashed, or to be suffering from a mere irregularity not vitiating it. This was also the view of the majority of the Full Bench in (1969) 71 Pun LR (D) 61 (FB) (supra) with which I respectfully agree. Delivering the judgment of the majority, Dua, C. J., observed:

"The object and purpose of the Rules would appear to be to see that the members of the Armed Forces are not taken away from military duty without the concurrence of the Army Authorities so that the defence of the country does not suffer. It is the larger public interest which is kept in view and the Army Authorities are given the right and the duty to determine the forum for the trial of the members of the Armed Forces. It is not meant to confer a right on the accused person different from other accused persons. The defence of the country, however, is truly not to be made to suffer because of ignorance of the Magistrates, or of the accused or the prosecution or even of the Army Authorities who may be unaware of the technicalities of the statutory rules. But this purpose can quite effectively be served if the Army Authorities are made fully aware of a criminal case against a member of the Armed Forces and they are afforded or have had an adequate and full opportunity to exercise the discretion of having the accused tried by a Court-martial. In order to achieve this object, it does not seem to be an essential jurisdictional condition precedent to require literal and meticulous compliance with the form and the manner of notice prescribed in Rules 3 and 4 of the Rules, failure to do which would automatically by itself, without more, nullify the proceeding rendering the trial, the sentence and the resultant punishment as if tainted with absence of inherent jurisdiction. Having had full knowledge of the charge and the opportunity to come to a decision on the question of the forum of trial, if the Army Authorities voluntarily deliver the accused to the civil authorities for trial, the statutory purpose and object may well ordinarily be held to have been accomplished."

And again—

"In a case where the appropriate Army Authorities have intimated their decision to have the accused tried by a Court-martial, it may be that the trial or inquiry by the Magistrate without securing a favourable determination from the Central

Government would be liable in a given case to be quashed as illegal by the higher authorities, but this may not necessarily mean that the Magistrate has acted without jurisdiction, rendering the proceedings non est."

Dua, C. J., concluded:

"As a result of the foregoing discussion, the violation of Rules 3 and 4 of the Rules does not seem to us by itself to deprive the Magistrate of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and the effect of such violation has to be determined on evaluation of all the facts and circumstances of each case."

What then are the circumstances obtaining in the case with reference to which the question of illegality or otherwise of the trial of the appellant has to be determined? As stated in the referring order, it is only when the charge was framed against the appellant and his plea was recorded that he stated his occupation to be service in the Indian Air Force. When he was examined in pursuance of the provisions of Section 342 of the Code of Criminal Procedure, after the close of evidence at the trial, he again asserted that he was an employee of that Force. Apart from this, there was no material either with the Committing Magistrate or with the learned Additional Sessions Judge to indicate that the appellant had anything to do with the Air Force. Neither of them was informed at any stage that the appellant was regular Air Force employee having been enrolled as such under the Act or that he was on active service either in fact or by virtue of the legal fiction forming the basis of the notification above-mentioned and that, therefore, his case was covered by the provisions of Cl. (a) of Section 72 read with those of Section 9 and Section 2 of the Act and of the said notification. Their failure to take note of the provisions of Section 549 of the Code of Criminal Procedure and the rules framed thereunder arose neither out of deliberation nor of negligence. Even if it be said, however, that after the appellant had disclosed his occupation to the Committing Magistrate, the latter could hold further enquiry into the matter. I do not think that any useful purpose would thereby have been served as it appears that the Air Force authorities do not intend to claim a trial of the appellant by a Court-martial. In this connection I may refer to the affidavit dated the 20th of August, 1969, sworn by Wing Commander K. S. Suri and placed before the referring Division Bench which states that the deponent is the Officer Commanding to whom the case of the appellant should have been referred by the Criminal Court in accordance with the provisions of Section 124 of the Act read with Section 549 of the Code of Criminal Procedure.

Although a period of five months has elapsed since the affidavit was filed, Wing Commander Suri has not made a claim that the trial of the appellant should have been by a Court-martial. And Wing Commander Suri's failure in that behalf is understandable. The appellant was admittedly on leave from his Unit on the day of the occurrence and the victims of the offence alleged against him were persons not subject to Military, Air Force or Naval law. He was tried along with four others, his fifth co-accused having died before the case came up for trial. All his co-accused were persons not subject as aforesaid. It would thus be seen that the facts of the case are such as may well have persuaded the higher Air Force authorities not to take any action with reference to the provisions of Section 124 of the Act. Under the circumstances, I do not think the failure of the Courts below in not observing the provisions of Section 549 of the Code of Criminal Procedure and the rules made thereunder amounts to any illegality vitiating the trial, especially as no prejudice is shown to have been caused to the appellant in consequence, but would hold that it is a mere irregularity curable by what is contained in Section 537 of the Code. I am accordingly of the opinion that the case be sent back to the Division Bench for hearing of the appeal on merits.

26. HARBANS SINGH, J.:— I agree.

27. JINDRA LAL, J.:— I also agree.
Order accordingly.

• 1970 CRI. L. J. 1129 (Vol. 76, C. N. 279) ==

AIR 1970 TRIPURA 58 (V 57 C 13)

R. S. BINDRA J. C.

Smt Sushila Ghosh, Petitioner v. Was Deb Mutreja, Respondent.

Criminal Revn No 20 of 1967, D/- 8-9-1969, against order of Dist Magistrate, Tripura, D/- 6-5-1967.

(A) Criminal Procedure Code (1898), Ss. 133, 528 (2) — Proceedings under S. 133 — Transfer under S. 528(2) is legal. AIR 1956 Cal 220, Dissented.

The expression "any case" used in sub-section (2) of S. 528 is obviously of widest amplitude and does not admit of narrow interpretation so as to exclude the provisions of Chapter X in which S. 133 occurs from its operation. AIR 1956 Cal 220, Dissented. (Paras 5, 9)

(B) Criminal Procedure Code (1898), S. 528(2) — Transfer of a case to another Magistrate under the section — Transfer on request of parties — Transfer not legal — Consent to transfer cannot confer jurisdiction on transferee court. (Para 4)

BN/BN/G134/69//MNT/B

Cases Referred: Chronological Paras (1956) AIR 1956 Cal 220 (V 43) =

1956 Cri LJ 614, Jhatu Charan Das v. Bhanu Chandra Das

3

N. L. Choudhury, for Petitioner; H. Dutta and R. Ghosh, for Respondent.

ORDER: This criminal revision petition by Sushila Ghosh springs from a case instituted by her under Section 133 of the Criminal Procedure Code against Was Deb Mutreja and raises the question whether the provisions of Section 528 of the Code apply to such a case

2. How this question arose between the parties can be stated in a few words. On 30th of March, 1966, Sushila Ghosh presented a petition under Section 133 of the Code before Shri P. Majumdar, the then District Magistrate, Tripura. The conditional order was made by the latter on 21-4-1966 and the respondent Was Deb was summoned by him to show cause against that order. Objections against the order were filed by Was Deb on 11-5-1966 but before any other step could be taken in the case, Shri P. Majumdar was transferred and succeeded by Shri S. M. Kanwar, and the latter, by his order dated 20th of September, 1966, transferred the case to the Sub-Divisional Magistrate, Sadar. The Sub-Divisional Magistrate had recorded only a part of the evidence by 5-5-1967 when Was Deb applied to the District Magistrate under Section 528 of the Code for withdrawing the case from the Sub-Divisional Magistrate and placing it either on his own file or making it over to some other competent Magistrate. The District Magistrate issued notice of that application of Sushila Ghosh for the next day, viz., 6-5-1967, and on that day he made an order withdrawing the case from the Sub-Divisional Magistrate and placing it on his own file. It is mentioned in the relevant order that the transfer was being made at the request of the counsel for the parties and for the reason that no effective steps had been taken by the Sub-Divisional Magistrate although a number of hearings had been fixed in the case. After the transfer order, dated 6-5-1967, statements of some witnesses were recorded by Shri A. Bhattacharjee, the Acting District Magistrate, when Shri S. M. Kanwar went on leave, and another two witnesses were examined by the latter after he joined back the office. For recording rest of the evidence, the case was fixed by him for 31st of August, 1967. However, one day before that date Sushila Ghosh moved the instant revision petition challenging the validity of the order dated 6-5-1967, by which the District Magistrate had withdrawn the case from the file of the Sub-Divisional Magistrate and had placed it on his own. It was alleged in the petition that all the proceedings that had taken

place after 6-5-1967 were without jurisdiction and as such void. The prayer made was that the case should be sent back to the Sub-Divisional Magistrate of Sadar for disposal according to law.

3. Shri N. L. Choudhary urged for the petitioner Sushila Ghosh that Section 133 of the Code forms part of Chapter X and that the scheme of various sections of that Chapter indicates that the proceedings instituted under Section 133 have to be dealt with right from the beginning until they conclude by the Magistrate who begins the enquiry and by none else. In other words, tersely put, the point canvassed was that S. 528 of the Code has no applicability to the proceedings initiated under Chapter X of the Code. In support of this contention he placed reliance on the authority reported in *Jhantu Charan Das v. Bhanu Chandra Das*, AIR 1956 Cal 220. Shri H. Dutta, representing Was Deb, submitted, on the other hand, that Section 528 covers the subject of transfer of "cases" and that the expression "cases" is wide enough to include a case under Section 133 of the Code. He invited my attention to a number of authorities according to which the security proceedings under Chapter VIII and the proceedings under Sections 144, 145, 488 and 491 of the Code have been declared to be cases and as such liable to transfer under Section 528. He, therefore, assailed the correctness of the view taken in the case of *Jhantu Charan Das* by the Calcutta High Court.

4. Shri Dutta submitted further that the order of transfer dated 6-5-1967 had been made at the request of the parties' counsel and as such the revision petition merited dismissal on that score alone. Shri N. L. Choudhary conceded that the parties' counsel had agreed to the transfer of the case on 6-5-1967, but that fact, he urged, could not confer jurisdiction on the transferee Magistrate, namely, the District Magistrate, Tripura to deal with the case. I agree that if the transfer order dated 6-5-1967 is bad in law, then the mere consent of the parties' counsel to the transfer of the case could not confer jurisdiction on the District Magistrate to deal with it. A joint prayer by the parties to a case that it should be tried by a court cannot confer jurisdiction on that Court, if in terms of the law that Court cannot have jurisdiction in the matter. Hence, the objection of Shri Dutta against the maintainability of the petition founded on the request made by the present petitioner's counsel to the transfer of the case on 6-5-1967 cannot by itself foil the revision petition though it may be correct that in the context of that request the challenge to the transfer order may not stand the test of the principles of ethics in the Gandhian sense.

5. This brings us to the consideration

of the main point in controversy, namely, whether Section 528 applies to proceedings under Section 133. Sub-section (2) of Section 528 provides, inter alia, that any District Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same. The expression "any case" used in the sub-section is obviously of widest amplitude, and since that expression has been interpreted to include all varieties of cases that crop up under the various provisions of the Code, say for example, security proceedings under Chapter VIII of the Code and proceedings under Sections 144, 145, 488 and 491 of the Code, if the Legislature meant to make any exception relating to cases under Chapter X of the Code it was not difficult for it to say so in explicit terms. The language of sub-section (2) of Section 528 does not admit of the narrow interpretation canvassed on behalf of the petitioner. The provisions of sub-section (2) have been in existence in their present form right from the year 1898 when the Code came into force in India. Excepting the aforementioned Calcutta authority of 1956, there is no other decision holding that that sub-section does not apply to cases under Chapter X of the Code. It is, therefore, proper that the ratio of the decision of the Calcutta High Court should be looked into for appreciating its correctness or otherwise.

6. The facts of the Calcutta case are that the conditional order was made by the Sub-Divisional Magistrate and he required *Jhantu Charan*, the person proceeded against, to appear before another Magistrate Shri A. D. Bagchi for showing cause, if any, against that order. Shri Bagchi examined a number of witnesses under Section 139A of the Code and on reaching the conclusion that there was no substantial evidence to support the denial by *Jhantu Charan* of the public right claimed by *Bhanu Chandra Das*, he directed that the case shall proceed in terms of Section 137 of the Code. However, before anything further could be done Shri Bagchi was transferred and in consequence the case was withdrawn from his Court by the Sub-Divisional Magistrate and transferred to the file of Shri A. K. Banerjee, another Magistrate at the same station. In course of time, Shri Banerjee made absolute the conditional order issued by the Sub-Divisional Magistrate. It is against this order that *Jhantu Charan* went in revision to the High Court. *Debabrata Mookerjee, J.*, held that the order by which the Sub-Divisional Magistrate withdrew the case from Shri Bagchi and transferred it to Shri Banerjee lacked le-

gal sanction and as such all the proceedings that took place before Shri Banerjee and the final order made by him stood vitiated. Mookerjee, J., posed the following question in para 6 of the report:

"Question then arises whether during the pendency of proceedings under Section 133 it is open to the Sub-Divisional Magistrate or the District Magistrate to transfer the proceedings to another Magistrate. The power of transfer is given by S 192, Criminal P. C."

This extract from the judgment indicates that the transfer of the case had probably been ordered by the Sub-Divisional Magistrate under Section 192 of the Code. Mookerjee, J., held, while interpreting that section, that "the power of transfer under S. 192 is limited to a case of which cognizance has been taken". "That means and implies", he added, "the commission of an offence of which cognizance has been taken". However, he observed further, "But in proceedings under S 133, Criminal P. C., there is no question of taking cognizance of an offence. That being so, Section 192 cannot possibly be called in aid to support an order of transfer of proceedings under Section 133, Criminal P. C." Having reached that conclusion, in regard to which I need make no comment, because that question does not arise for determination in the present petition since the transfer here was made under Section 528 and not under Section 192, nor was it argued before me, Mookerjee, J., proceeded to observe that, "Apart from these conditions it must be held that proceedings commenced under S. 133, Criminal P. C., before a Magistrate have to be concluded before him. The reason for such procedure is not far to seek". He then concluded as follows:

"Obviously, the legislature felt that where a person is going to be precluded from exercising his rights on grounds of public health, safety or convenience all matters appertaining to the questions must be heard and disposed of by one and the same Magistrate who has had the advantage of seeing witnesses and hearing evidence during the two stages in which proceedings under S. 133 of the Code divide themselves"

I think, with all respect to Mookerjee, J., that this reasoning only begs the question. The precise point for determination before Mookerjee, J., was whether the Legislature has prescribed anywhere in the Code that a case under Section 133 of the Code cannot be transferred from one Magistrate to another. Instead of finding a reply to that point from within the body of the Code Mookerjee, J., ascribed an intention to the Legislature to support the finding that a case under Section 133 has necessarily to be disposed of by the Magistrate who starts with it after the conditional order is made.

7. Towards the close of para 6 of the judgment it is again mentioned:

"It is, therefore, quite understandable why the Legislature thought it fit that in a case like this, the entire proceedings must be heard and disposed of by one and the same Magistrate; and that being so, the scheme of Chapter X repels the notion of transfer so that the proceedings may be effectively prevented from being dealt with in a piecemeal fashion. Even the wide words of Section 528(2) of the Code cannot be allowed to prevail and interfere with the scheme of Chapter X of the Code"

The last sentence of this excerpt appears to be in the nature of obiter dictum for the report does not indicate that the transfer of the case to Shri Banerjee had been made under Section 528 (2). This latter conclusion can be supported on the footing that the entire discussion of the question debated in the High Court was made in reference to S 192, and S 528 (2) was mentioned for once and only in that last sentence. Further, the opening word 'Even' of that sentence indicates that the provisions of Section 528(2) were not relied upon by the petitioner before the High Court in support of the proposition canvassed. However, I do not want to distinguish the Calcutta case from the one in hand on that basis.

8. Earlier in para 5 of the report it had been mentioned by Mookerjee, J., that if for any reason the Magistrate named in the conditional order is not available to continue the proceedings, the proceedings cannot be transferred to another Magistrate to be dealt with by him. This finding of Mookerjee, J., would lead to the eventuality that if the Magistrate who started the inquiry in the case cannot for any reason continue with the same, then the case would remain hanging and not taken to its logical conclusion. I think this would be much too non-pragmatic an approach to commend itself either to Legislature or to courts. It is the inalienable right of the party instituting a case under Section 133 to insist and demand that the claim made by him should be decided one way or the other. The Legislature could not have contemplated with equanimity that despite the comprehensive nature of the Code a case under Section 133 may remain undetermined. One can visualise a large number of contingencies, or even exigencies, where the Magistrate who began hearing the case under Section 133 may not be able to conclude it. To cite only a few, the transfer of the Magistrate may become inevitable, he may retire, or he may be taken ill so grievously that he is forced to proceed on long leave. In neither of such contingencies, if the view of Mookerjee, J., is to prevail, the case of the unfortunate party

coming to court under Section 133 would reach its destined end. Such practical difficulties, apart from the fact that there is no indication, explicit or by implication, of the Legislative intendment that S 528 does not apply to a case under Chapter X of the Code, militate in a telling manner against the contention canvassed by Shri N L Choudhury on behalf of the petitioner. Another relevant consideration would bring out strikingly the untenability of that proposition. Supposing, the Magistrate after having been seized with the case develops personal interest in its outcome, and the party aggrieved by that attitude of the Magistrate wants its transfer and moves the Sessions Judge or the High Court for the purpose. Shall the Sessions Judge or the High Court hold hands even after being satisfied that the grievance voiced is genuine? The answer to the question can be in the negative only if the language of Section 528, or any part of Chapter X, of the Code constitutes an insurmountable hurdle. However, I do not find any such hurdle in any of those provisions. Hence, I find it difficult to accept the view taken in the Calcutta authority.

9. It would follow that the order dated 6-5-1967 made by the District Magistrate is not proved to suffer from any legal or other infirmity. That order being perfectly justified in law, the present petition must fail as a consequence. Hence, I reject it.

Revision dismissed

1970 CRI. L. J. 1132 (Vol. 76, C. N. 280) =
AIR 1970 SUPREME COURT 1153 (V 57 C 242)
(From. Mysore)*

M. HIDAYATULLAH, C. J., A. N. RAY
AND I. D. DUA, JJ.

Bhimappa Bassappa Bhu Sannavar, Appellant v. Laxman Shivarayappa Samagouda and others, Respondents.

Criminal Appeal No. 166 of 1967, D/- 11-3-1970

(A) Criminal P. C. (1898), S. 417 (3) — Special leave to appeal — Right to — Offence of mischief by fire — Case triable exclusively by Court of Session — Two separate cases instituted, one on police report and the other on complaint — Identity of cases maintained upto the end of Sessions trial — Both cases ending in acquittal — Complainant held had

*(Misc. Criminal Petn. No. 610 of 1966, D/- 28-11-1966—Mys)

DN/DN/B206/70/BDB/A

right to move High Court for special leave under Section 417 (3) in his own case — Misc. Cri. Petn. No. 610 of 1966, D/- 28-11-1966 (Mys), Reversed.

Certain house was set on fire to cause loss to its owner B. On a report the police arrested respondents 1 and 2 and submitted a charge-sheet against them in the Court of the Magistrate. B was dissatisfied that the police had not prosecuted one M, respondent 3, also and he filed a complaint in the same Court in which he charged the two respondents with respondent 3 with the same offence of mischief by fire but with the aid of Section 34, Penal Code. The Magistrate inquired into the two cases together and finding a prima facie case established committed the first two respondents and the third respondent separately to the Court of Session. The two Sessions cases were separately numbered. The Sessions Judge held the respondents not guilty and acquitted them. The appellant then applied under Section 417 (3), Criminal P. C for special leave to appeal against the acquittal of the three respondents.

Held that there could be no manner of doubt that one of the cases was instituted on the report of a police officer and the other on the complaint of the complainant. There could be no question of merger because the identity of the two cases was maintained right up to the end of the Sessions trial. The police did not present a charge-sheet against respondent 3 and his trial could be said to be in the other case and no in the case filed by the police. In this view it was plain that B was entitled to move the High Court for special leave under Section 417 (3), Criminal P. C in his own case. (Paras 18, 20)

The fact that B's application for revision was rejected had no bearing on his statutory right to move the High Court Misc. Criminal Petn. No. 610 of 1966 D/- 28-11-1966 (Mys), Reversed. (Whether B could ask for leave against respondent 3 alone or against the other two respondents alone, left open.)

(Para 19)

(B) Criminal P. C. (1898), S. 417 (3) — "Case" — Meaning — (Words and Phrases — Case).

The word 'case' is not defined by the Code but its meaning is well understood in legal circles. In criminal jurisdiction it means ordinarily a proceeding for the prosecution of a person alleged to have committed an offence. In other contexts

the word may represent other kinds of proceedings. But in the context of Section 417 (3) it must mean a proceeding which at the end results either in discharge, conviction, or acquittal of an accused person. (Para 9)

(C) Criminal P. C. (1898), S. 417 (3) — "Instituted" — Meaning.

Section 417 (3) refers to a case in which cognizance is taken upon a complaint of facts constituting an offence. (Para 10)

(D) Criminal P. C. (1898), S. 4 (1) (h) — Complaint includes oral allegation.

The word 'complaint' has a wide meaning since it includes even an oral allegation. It may, therefore, be assumed that no form is prescribed which the complaint must take. It may only be said that there must be an allegation which prima facie discloses the commission of an offence with the necessary facts for the Magistrate to take action. (Para 11)

The Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal by special leave against the judgment and order of the High Court of Mysore dated November 28, 1966 in Misc. Criminal Petition No. 610 of 1966. By that order the High Court held that the present appellant Bhimappa had no locus standi to invoke Section 417 (3) of the Code of Criminal Procedure and to ask for special leave to file an appeal against the acquittal of the respondents. The appellant questions the correctness of the order.

2. Bhimappa (appellant) had a house at Athni, Taluka Belgaum District. It stood in the name of his eldest son and his two other sons lived in one part of the house and the other part was let out to the first respondent Laxman who ran a boarding house and also lived there with his wife and children and his mistress Champeyya, the second respondent. No rent was fixed but the sons of Bhimappa used to have their meals with respondents Nos. 1 and 2. Bhimappa asked his tenant to vacate the house as he wanted to reside in it himself and his son Yamanappa (P. W. 14) wanted space for a godown for 400 bags of groundnut purchased by him. The first respondent was asked to vacate a portion of the house but was reluctant.

3. It is not necessary to give the details of what happened further. Suffice it to say that the house was set on fire to cause loss to Bhimappa. All efforts

to save the house failed and it was burnt down. Yamanappa then filed a report in the police station. The police arrested respondents Nos. 1 and 2 and submitted a charge-sheet against them in the Court of Junior Magistrate, Athni.

4. Bhimappa was dissatisfied that the police had not prosecuted Melappa, respondent No. 3 also and he filed a complaint against him in the same court. The Magistrate inquired into the two cases together and finding a prima facie case established committed the first two respondents and the third respondent separately to the Court of Session. The three respondents asked that the two cases be consolidated and a combined charge be framed in the case. The two Sessions cases were numbered as Sessions Trials Nos. 79, 80 of 1965. They were tried together and the Sessions Judge, Belgaum by his judgment, July 13, 1966 held the respondents not guilty and acquitted them.

5. The appellant then applied to the High Court of Mysore under Sec. 417 (3) of the Code of Criminal Procedure for special leave to appeal against the acquittal of the three respondents. With the petition he filed a memorandum of appeal. The High Court held on November 28, 1966 as follows:

"The petitioner has no locus standi to prefer an appeal when the State had prosecuted the respondent in the Sessions Court. This petition is dismissed.

Sd/- H. Hombe Gowda,
Chief Justice,
Sd/- M. Santhosh."

6. Bhimappa filed also a revision application, which was dismissed on December 5, 1966 by C. Honniah, J. Bhimappa's request for a certificate was also rejected. He now appeals to this Court. His contention is that he had a right to move the High Court under Section 417 (3) of the Code of Criminal Procedure for special leave as the order of acquittal was passed in a case instituted upon his complaint. The High Court could not, therefore, hold that he had no standing to move the High Court under S. 417 (3) of the Code of Criminal Procedure.

7. Sub-section (3) of Section 417 as an amendment was introduced by Act XXVI of 1955. Previously the right of appeal against acquittal belonged only to the State Government. By the amendment this right is also conferred on a complainant if the order of acquittal is passed in any case instituted upon com-

plant. The sub-section may be read here:

"3. If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

Under sub-section (4) the application has to be made within 60 days from the date of the order of acquittal while under sub-section (5) if the application under sub-section (3) for the grant of special leave to appeal from the order of acquittal is refused, no appeal from that order of acquittal shall lie at the instance of the State Government.

8. The short question in this case is whether the Sessions case started on the complaint of Bhimappa entitles him to move the High Court for special leave (a) against all the three respondents or (b) at least against respondent No. 3.

9. The answer to this question depends upon whether we can say that there was a case instituted upon a complaint by Bhimappa in which an acquittal was recorded, for those are the words of the sub-section and also the condition precedent to the right. The word 'case' is not defined by the Code but its meaning is well understood in legal circles. In criminal jurisdiction it means ordinarily a proceeding for the prosecution of a person alleged to have committed an offence. In other contexts the word may represent other kinds of proceedings but in the context of the sub-section it must mean a proceeding which at the end results either in discharge, conviction, or acquittal of an accused person.

10. What is meant by 'instituted' may next be explained. There are three different ways in which cognizance is taken by Magistrates of offences. This is stated in S. 190 of the Code. They are

"(a) upon receiving a complaint of the facts which constitute an offence;

(b) upon a report in writing of such facts made by any police officer,

and (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed." The third sub-section, therefore, obviously refers to a case in which cognizance is taken upon a complaint of facts constituting an offence. The word 'complaint' has been defined in S. 4(1)(h) and means an allegation made orally or in writing to a Magistrate, with a view to his taking

action, under the Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer.

11. The word 'complaint' has a wide meaning since it includes even an oral allegation. It may, therefore, be assumed that no form is prescribed which the complaint must take. It may only be said that there must be an allegation which prima facie discloses the commission of an offence with the necessary facts for the Magistrate to take action. Section 190(1)(a) makes it necessary that the alleged facts must disclose the commission of an offence.

12. The Code then proceeds to provide different procedures for different cases arising under S. 190 and also in relation to the seriousness of the offence. Chapter XVI deals with proceedings instituted upon a complaint, Chapter XVIII with inquiries into cases triable by the Court of Session or the High Court, Chapter XX with the trial of Summons cases by Magistrates, Chapter XXI with the trial of Warrant cases by Magistrates, Chapter XXII with summary trials and Chapter XXIII with trial before High Courts and Courts of Session.

13. The offence here was mischief by fire with intent to destroy a house etc. punishable under Section 436, I P. C. This offence is triable exclusively by the Court of Session. Section 207 of the Code of Criminal Procedure provides:

"Procedure in inquiries preparatory to commitment—

In every inquiry before a Magistrate where the case is triable exclusively by a Court of Session or High Court, or in the opinion of the Magistrate, ought to be tried by such Court, the Magistrate shall—

(a) in any proceeding instituted on a police report, follow the procedure specified in Section 207A, and

(b) in any other proceeding, follow the procedure specified in the other provisions of this Chapter."

Under Section 206 the Magistrate is required to commit an accused to the Court of Session for trial. In cases triable by the Magistrate himself he has to follow the procedure for trial of cases according to the other procedure mentioned earlier by us. As this was a case for the application of Sections other than Section 207-A it fell under Section 208. That section provides for cases of complaint and the complainant has to be heard when the accused appears or is brought before the Magistrate who has to take such evidence as may be produced in sup-

port of the prosecution or on behalf of the accused, or as may be called by the Magistrate. Then under Section 209 the accused may be discharged unless the Magistrate considers it necessary that the person should be tried before himself or some other Magistrate in which cases he shall proceed accordingly. If he considers that there are reasons to commit the accused, he shall frame a charge, explain it to the accused, obtain from the accused a list of his defence witnesses. The Magistrate may in his discretion examine any of these witnesses and then commit the accused to stand his trial before the Court of Session or if satisfied that there are no grounds for committing the accused, he may cancel the charge and discharge the accused.

14. It will be noticed that in a case involving an offence triable exclusively by the Court of Session the procedure under Sections 206-220 has to be followed if the complaint is filed initially. There are other sections in the Chapter and other supplementary provisions which are not relevant to the discussion and, therefore, reference to them is omitted here.

15. The position regarding other cases triable by the Magistrate himself or by another magistrate are laid down in Chapter XVI. There the magistrate shall examine the complainant and the witnesses present, if any. The Magistrate may even send the case to the Police for investigation under Section 156 (3) if he is empowered to act under Section 190. This procedure of course does not arise in cases in which the trial is of an offence triable by the Court of Session. As we are not concerned with the problems arising under Chapter XVI we refrain from expressing an opinion on the various aspects of the problem arising under that Chapter. For that reason we do not refer to cases which were mainly concerned with trials before Magistrate.

16. In the present case the police had put up a charge-sheet against two respondents only. Bhimappa filed a complaint in which he charged these two respondents and respondent No. 3 with the same offence of mischief by fire but with the aid of Section 34 I. P. C. As he had charged the three respondents with having entered into a Criminal Conspiracy a charge under Section 120-B I. P. C. was also framed while committing the accused to the Court of Session. Mallappa was also charged under Section 436 read with Section 109 I. P. C. for abetment of the offence by the other accused. The two cases in the Magistrate's Court were regis-

tered under their own numbers but were tried together and were committed separately. In the Court of Session they were also registered separately and bore numbers Sessions Cases Nos. 79 and 80 of 1965. Both the cases ended in acquittal.

17. Bhimappa applied for special leave in both cases to file an appeal under Section 417 (3). His right to ask for special leave was not accepted in the High Court.

18. Now there can be no manner of doubt that one of the cases was instituted on the report of a police officer and the other on the complaint of the complainant. There can be no question of merger because the identity of the two cases is maintained right up to the end of the Sessions trial. The case of Bhimappa proceeded on its own number and although evidence was led in both the cases together, the acquittal was recorded in each of the two cases. The police did not present a charge-sheet against Mallappa and the trial of Mallappa can be said to be in the other case and not in the case filed by the police. In this view of the matter it is quite plain that Bhimappa was entitled to move the High Court for special leave in his own case. The order, saying that he had no standing cannot, therefore, be sustained.

19. Bhimappa had also applied for revision and his application was rejected. He applied for special leave against that order but leave was refused by this Court. It was argued that that must conclude the matter. We do not agree. Bhimappa's statutory right to move the High Court could not be lost by reason of the revision. The result of the revision, therefore, had no bearing upon the matter.

20. Bhimappa was thus entitled to have a hearing of his petition for special leave under Section 417 (3) of the Code. Whether he could ask for leave against Mallappa alone or against the other two because the charge under Section 120-B I. P. C. was framed against all the three respondents on his complaint is a point which we do not decide because it will be for the High Court to consider the matter when his petition is considered and only if it is allowed.

21. We accordingly set aside the order of the High Court and remit the case for consideration of the petition under Section 417(3) filed by Bhimappa.

Appeal allowed.

1970 CRI. L. J. 1136 (Vol. 76, C. N. 281) =

AIR 1970 SUPREME COURT 1228 (V. 57 C 258)

(From. Calcutta)

M HIDAYATULLAH, C. J., A. N.
GROVER, A. N. RAY AND
I. D. DUA, JJ.

Arun Ghosh, Petitioner v. State of West
Bengal, Respondent.

Writ Petn. No. 287 of 1969, D/- 2-12-
1969.

Public Safety — Preventive Detention
Act (1950), Section 3 (2) — Detention —
Grounds for — Individual acts — When
can be subversive of public order — Pub-
lic order and law and order — Distinc-
tion between.

The question whether a man has only
committed a breach of law and order or
has acted in a manner likely to cause a
disturbance of the public order is a ques-
tion of degree and the extent of the reach
of the act upon the society. An act by
itself is not determinant of its own
gravity. In its quality it may not differ
from another but in its potentiality it
may be very different. Similar acts in
different contexts affect differently law
and order on the one hand and public
order on the other. It is always a ques-
tion of degree of the harm and its effect
upon the community. Individual act can
be a ground for detention only if it leads
to disturbance of the current of life of
the community so as to amount a dis-
turbance of the public order and not if it
affects merely an individual leaving the
tranquillity of the society undisturbed.

(Para 3)

Public order embraces more of the
community than law and order. Public
order is the even tempo of the life of the
community taking the country as a whole
or even a specified locality. Disturbance
of public order is to be distinguished
from acts directed against individuals
which do not disturb the society to the
extent of causing a general disturbance
of public tranquillity. It is the degree
of disturbance and its effect upon the
life of the community in a locality which
determines whether the disturbance
amounts only to a breach of law and
order. AIR 1966 SC 740 & W. P. No. 179
of 1968, D/- 7-11-1968 (SC) & W. P.
No. 102 of 1969, D/- 4-8-1969 (SC), Fol-
lowed.

(Para 3)

Cases Referred: Chronological Paras
(1969) W. P. No. 102 of 1969, D/-
4-8-1969 (SC), Shyamal Chakra-
borty v. Commr. of Police, Cal-
cutta 3, 4

(1968) W. P. No. 179 of 1968, D/-
7-11-1968 (SC), Pushkar Mukherjee
v. State of W. B. 3, 4

(1966) AIR 1966 SC 740 (V 53) =
1966-1 SCR 709, Ram Manohar
Lohia v. State of Bihar 3, 5

Mr. Janendra Lal, Advocate, Amicus
Curiae, for Petitioner; S. P. Mitra, Advo-
cate and G. S. Chatterjee for Sukumar
Basu, Advocate, for Respondent.

The following Judgment of the Court
was delivered by

HIDAYATULLAH, C. J.:— The peti-
tioner Arun Ghosh has been detained by
the District Magistrate Malda under Sec-
tion 3 (2) of the Preventive Detention Act.
The order was made on June 2, 1969 and
he was arrested the following day. The
order states that it was made to prevent
him from acting prejudicially to the main-
tenance of public order. His representa-
tion was rejected by the Advisory Board
and also independently by the State Gov-
ernment. We have looked into the case
and are satisfied that there was no undue
delay at any stage in dealing with the
various aspects of his detention as laid
down in the Act.

2. It is, however, contended that the
grounds which were furnished to him on
June 3, 1969 do not bear upon the main-
tenance of public order or of his acting
prejudicially to the maintenance of public
order. This is the only point urged in
support of the petition by the learned
counsel. In the affidavit filed in reply the
District Magistrate has summarised the
grounds as 'anti-social activities including
rioting, assault and undue harassment to
respectable young ladies in the public
street of Malda town.' The details of
these activities are to be found in the
grounds and may be summarised as fol-
lows.

18-5-1966 Teased one Rekha Rani Barua,
and when her father protested
confined and assaulted him.

29-3-1968 One Deepak Kumar Ray was
wrongfully restrained and as-
saulted with lathis and rods.

1-4-1968 Attempt was made to assault
Deepak Kumar Ray at the
Malda Sadar Hospital where
he was being treated for his
injuries in the previous assault.

- 2-9-1968 Threatened one Phanindra C. Das that he would insult his daughter publicly.
- 26-10-1968 Embraced Uma Das d/o Phanindra C. Das and threw white powder on her face (Criminal case started).
- 7-12-1968 Obscenely teased Smt. Sima Das, sister of Uma Das and beat her with chappals.
- 18-12-1968 Smt. Sima Das was again teased.
- 26-1-1969 Threatened the life of Phanindra C. Das.

3. The submission of the counsel is that these are stray acts directed against individuals and are not subversive of public order and therefore the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. In support of this submission reference is made to three cases of this Court: Dr. Ram Manohar Lohia v. State of Bihar, 1966-1 SCR 709 = (AIR 1966 SC 740), Pushkar Mukherjee v. State of West Bengal, W. P. No. 179 of 1968, D/- 7-11-1968 (SC) and Shyamal Chakraborty v. Commr. of Police, Calcutta, W. P. No. 102 of 1969, D/- 4-8-1969 (SC). In Dr. Ram Manohar Lohia's case 1966-1 SCR 709 = (AIR 1966 SC 740) this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of

the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being way-laid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as *ordre public*. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in *Writ Petn. No. 179 of 1968 (SC)* drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of pub-

lic order. In Dr. Ram Manohar Lohia's case, 1966-1 SCR 709 = (AIR 1966 SC 740) examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another.

4. In the present case the acts of the petitioner affected the family of Phanindra C. Das and also two other individuals who were assaulted. The case is distinguishable from Writ Petn. No. 102 of 1969 (SC) where three instances of rioting armed with lathis, iron rods and acid bulbs etc, were held sufficient to disturb the even tempo of public life in that locality and were treated as disturbance of public order. On the other hand in Writ Petn. No. 179 of 1968 (SC) assaults on four persons A, B, C and D and throwing a cracker into a police wireless van were not held to add up to the disturbance of public order. They were treated as separate acts which affected individuals but did not affect the community at large.

5. In the present case all acts of molestation were directed against the family of Phanindra C Das and were not directed against women in general from the locality. Assaults also were on individuals. The conduct may be reprehensible but it does not add up to the situation where it may be said that the community at large was being disturbed or in other words there was a breach of public order or likelihood of a breach of public order. The case falls within the dictum of Justice Ramaswami, and the distinction made in Dr Ram Manohar Lohia's case, 1966-1 SCR 709 = (AIR 1966 SC 740)

6. The result therefore is that however reprehensible the conduct of Arun Ghosh may be, it cannot be said to amount to an apprehension of breach of public order for which alone his detention could be ordered. He is entitled to be released and we order accordingly.

He will be released forthwith unless required in some other connection.

Petition allowed.

1970 CRI. L. J. 1138 (Vol. 76, C. N. 282) =
AIR 1970 SUPREME COURT 1266 (V 57 C 264)

(From: Gujarat)

A. N. RAY AND I D. DUA, JJ.

Hethubha and others, Appellants v.
The State of Gujarat, Respondent.

Criminal Appeal No. 100 of 1967, D/-
13-3-1970.

(A) Criminal P. C. (1898), Section 429 — Division Bench — Difference of opinion — Reference to third Judge — Third Judge is to deal with the whole case and is free to resolve difference as he thought fit.

Under Section 429, the whole case is to be dealt with by the third Judge and not merely the differences between the two Judges comprising the Court of Appeal. It was for the third Judge to decide on what points the arguments would be heard and therefore he was free to resolve the differences as he thought fit AIR 1965 SC 1467, Rel. on. (Para 10)

(B) Penal Code (1860), Section 34 — Common intention implies acting in concert — Common intention to kill — Mistake by accused as to killing X in place of Y — Effect — Common intention not displaced.

A mistake by one of the accused as to killing X in place of Y would not displace the common intention if the evidence showed the concerted action in furtherance of pre-arranged plan. The dominant feature of Section 34 is the element of participation in actions. This participation need not, in all cases, be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Section 34. The existence of common intention is to be the basis of liability. That is why the prior concert and the pre-arranged plan is the foundation of common intention to establish liability and guilt. (Para 13)

DN/DN/B414/70/VBB/Z

There was pre-arranged plan of the accused to commit offences. All the accused were lying in wait to attack the party of 'A', 'V', 'P' and 'Pa' who were returning in their carts from a near village to their own village. A was in the forefront. The accused attacked him. V was also attacked and prevented from going to the relief of A.

Held that the plea that A was mistaken for V would not take away the common intention established by pre-arranged plan and participation of all the accused in persons in furtherance of the common intention of them all without each one of them having intended to do the particular act in exactly the same way as an act might be done by one member of an unlawful assembly in prosecution of the common intention which the other members of the unlawful assembly did not each intend to be done. (Para 14)

In view of the fact that A was killed in furtherance of the common intention of all the accused, all the accused were guilty of murder under Section 302 read with Section 34. AIR 1965 SC 1260, Rel. on. (Para 15)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1260 (V 52)=
(1965) 1 SCR 287, Shankarlal
Kacharabhai v. State of Gujarat 13, 15
(1965) AIR 1965 SC 1467 (V 52)=
(1965) 2 SCR 771, Babu v. State
of Uttar Pradesh 10

The following Judgment of the Court was delivered by

RAY, J.:— This is an appeal from the judgment of the High Court of Gujarat.

2. The appellants were charged with offences under Sections 302 and 323 read with Section 34 of the Indian Penal Code. Accused Nos. 1 and 2 were charged for the individual offences under Sections 302 and 323 of the Indian Penal Code for intentionally causing death of Amarji and for causing simple hurt to Vaghji Mansangji. The deceased Amarji was the brother-in-law (sister's husband) of Vaghji Mansangji. Two important eye-witnesses were Pabaji, Dajibha and Pachanji Kesarji. Amarji was Pabaji's mother's sister's son. Pachanji is the first cousin of Vaghji Masangji.

3. Accused No. 3 Mulubha is the maternal uncle (mother's brother) of accused No. 2 Ranubha Naranji and accused No. 1 Hethubha alias Jithubha is the son of another maternal uncle of accused No. 2.

4. Accused No. 2 was residing at Bhalot. Vaghji also resided there. About two months prior to the date of the occurrence on 26th January, 1965 at 8 p. m. there was a quarrel between the children of the house of accused No. 2 Ranubha and the children of the house of Vaghji. There was exchange of words between the members of the two families. Accused No. 2 Ranubha and his father Naranji assaulted the wife of Vaghji. Vaghji then filed a complaint. Ultimately, the complaint was compounded on the intervention of accused No. 3 Mulubha. The prosecution case is that because of the behaviour of accused No. 2 Ranubha towards the wife of Vaghji, Ranubha had to leave his own village of Bhalot and had to go to reside with his maternal uncles at Bhuvad. The further prosecution case is that the relations of Ranubha thereafter went to village Bhalot for fetching the goods of Ranubha and at that time they had threatened Vaghji and others that Ranubha had to leave the village and Vaghji and others would not be able to continue to reside in the village.

5. On 26 January, 1965 Amarji, Pabaji, Vaghji and Pachanji took their carts of fuel wood for selling it in the village Khedoi which is about 7 miles from Bhalot. They left Bhalot at about 10 a. m. and reached Khedoi at about 1 p. m. The cart loads of fuel wood were sold in Khedoi by about 5 p. m. They made some purchases and then left Khedoi at about 7 p. m. While returning home Amarji's cart was in the front and Pabaji, Pachanji and Vaghji followed him in that order. There was not much distance between each cart. When the carts had gone about 2 miles from Khedoi and they were about to enter village Mathda, the three accused persons were noticed waiting on the road. All of them caught hold of Amarji and attacked him who was in the first cart. In the meantime, accused No. 3, Mulubha, caught hold of the hand of Pabaji and prevented him from going near Amarji. Mulubha was armed with an axe. Accused Nos. 1 and 2 dealt knife blows to Amarji. The prosecution suggested that the accused persons realised their mistake that instead of Vaghji they had attacked Amarji, and so, both the accused Nos. 1 and 2 left Amarji and went to the cart of Vaghji and gave blows with sticks to Vaghji. On seeing the attack on Vaghji Pabaji intervened and asked the accused to desist from attacking Vaghji any longer as they had already killed Amarji. Thereupon the accused

stopped attacking Vaghji. By this time Amarji had come staggering to the spot where Pabaji was standing. Then Amarji was placed in one of the carts and Vaghji was made to sit in that cart. Pachanji drove his cart first and the two carts without any drivers which had been formerly driven by Vaghji and Amarji, were kept in the middle and Pabaji with the two injured men in his cart was driving his cart last.

6. The carts were taken to village Khedoi. It is the prosecution case that the three accused persons followed these carts upto a certain distance and then accused Nos 1 and 2 left while accused No 3 disappeared near Khari Vadi. Pabaji took the carts to Moti Khedoi and saw police head constable Banasing who had come to Khedoi for patrolling work. Banasing was attached to the police outpost at Bhuvad. Banasing directed these persons to take Amarji to the Khedoi hospital. By that time Amarji had died. Banasing left Khedoi with Pabaji for Anjar police station which is about 8 miles from Khedoi. They reached Anjar at about 11 p m and Pabaji's F I R was recorded before police sub-inspector Khambholja. The police sub-inspector then proceeded to Khedoi hospital. Amarji was declared to be dead. The police sub-inspector recorded the statements of Vaghji and Pachanji and then took steps in the investigation of the case.

7. At the trial all the three accused denied having committed the offence. The Sessions Judge acquitted all the three persons under Section 302 read with Section 34. He however convicted all the accused for the offence punishable under Section 304 Part II read with Section 34 and sentenced them to suffer rigorous imprisonment for five years. Accused Nos. 1 and 2 were convicted for the offence under Section 323 and accused No 3 was convicted for the offence under Section 323 read with Section 34 of the Indian Penal Code. Accused Nos 1 and 2 were sentenced to suffer rigorous imprisonment for three months while accused No 3 was sentenced to suffer rigorous imprisonment for two months. All the sentences were to run concurrently.

8. All the accused filed appeals against their convictions. Before the Division Bench in the High Court of Gujarat Divan, J., held that accused No 1 alone was responsible for the fatal injury on Amarji and he was found guilty for the offence under Section 302 while accus-

ed Nos. 2 and 3 were found guilty for the offence under Section 324 read with Section 34. Shelat, J., was of the view that all the accused must be acquitted because he was not satisfied with the evidence and proof of the identity of the accused.

9. The case was then placed under Section 429 of the Criminal Procedure Code before Mehta, J., who held that accused No. 1 must be convicted for the offence under Section 302 while accused Nos. 2 and 3 must be convicted for the offence under Section 302 read with Section 34 and all of them should be sentenced to suffer rigorous imprisonment for life. The conviction of accused Nos. 1 and 2 under Section 323 and of accused No. 3 under Section 323 read with Section 34 was upheld. The conviction of all the accused under Section 304 Part II was altered by convicting accused No. 1 under Section 302 and accused Nos. 2 and 3 under Section 302 read with Section 34 of the Indian Penal Code.

10. Counsel for the appellants contended first that the third learned Judge under Section 429 of the Criminal Procedure Code could only deal with the differences between the two learned Judges and not with the whole case. The same contention had been advanced before Mehta, J., in the High Court who rightly held that under Section 429 of the Criminal Procedure Code the whole case was to be dealt with by him. This Court in *Babu v. State of Uttar Pradesh*, (1965) 2 SCR 771 = (AIR 1965 SC 1467) held that it was for the third learned Judge to decide on what points the arguments would be heard and therefore he was free to resolve the differences as he thought fit. Mehta, J., here dealt with the whole case. Section 429 of the Criminal Procedure Code states "that when the Judges comprising the Court of Appeal are equally divided in opinion, the case with their opinion thereon, shall be laid before another Judge of the same Court and such Judge, after such hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion". Two things are noticeable, first, that the case shall be laid before another Judge, and, secondly, the judgment and order will follow the opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case.

11. The second and the main contention of counsel for the appellants was that

here was no common intention to kill Amarji. The finding of fact is that the attack by the three accused was a concerted one under pre-arranged plan. Amarji was attacked by mistake but whosoever inflicted injury in the region of the collar-bone of Amarji must be held guilty of murder under Section 302. Amarji was further found to have been attacked by accused Nos. 1 and 2 and accused No. 3 who was armed with an axe caught hold of the hand of Pabaji. The injury on Amarji was an incised wound $1\frac{3}{4}" \times \frac{3}{4}"$ over the left side of the neck just above the left collar-bone. The direction of the wound was towards right and downwards. The other injury was incised wound $1" \times \frac{1}{2}" \times \frac{1}{2}"$ over the chest (right side) near the middle line between the 6th and 7th ribs.

12. The evidence establishes these features; first, that all the accused were related; secondly, they were residing at Bhuvad at the relevant time; thirdly, all the three accused made sudden appearance on the scene of the occurrence; fourthly, they started assault as soon as the carts arrived at the scene of the offence; fifthly, the way in which Amarji was attacked by accused Nos. 1 and 2 and stab wounds were inflicted on him and the manner in which accused No. 3 held up Pabaji would show that the three accused were lying in wait under some pre-arranged plan to attack these persons when they were returning to Bhalot. It therefore follows that the attack took place in pursuance of the pre-arranged plan and the rapidity with which the attacks were made also shows the pre-concerted plan. The attack by accused Nos. 1 and 2 on Amarji and the holding up of Pabaji by accused No. 3 all prove common intention, participation and united criminal behaviour of all and therefore accused No. 3 would be equally responsible with accused Nos. 1 and 2 who had attacked Amarji.

13. This Court in the case of *Shankarlal Kachrabhai v. State of Gujarat*, (1965) 1 SCR 287 = (AIR 1965 SC 1260) said that a mistake by one of the accused as to killing X in place of Y would not displace the common intention if the evidence showed the concerted action in furtherance of pre-arranged plan. The dominant feature of Section 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from

conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Section 34 of the Indian Penal Code. The existence of common intention is to be the basis of liability. That is why the prior concert and the pre-arranged plan is the foundation of common intention to establish liability and guilt.

14. Applying these principles to the evidence in the present case it appears that there was pre-arranged plan of the accused to commit offences. All the accused were lying in wait to attack the party of Amarji, Vaghji, Pabaji, and Pachanji. Amarji was in the forefront. The accused attacked him. Vaghji was also attacked and prevented from going to the relief of Amarji. The plea that Amarji was mistaken for Vaghji would not take away the common intention established by pre-arranged plan and participation of all the accused in furtherance of common intention. The act might be done by one of the several persons in furtherance of the common intention of them all without each one of them having intended to do the particular act in exactly the same way as an act might be done by one member of an unlawful assembly in prosecution of the common intention which the other members of the unlawful assembly did not each intend to be done.

15. In view of the evidence that Amarji was killed in furtherance of the common intention of all the accused the appellants are guilty of murder. In *Shankarlal's case*, (1965) 1 SCR 287 = (AIR 1965 SC 1260) (supra) this Court said that if the common intention was to kill A and if one of the accused killed B to wreak his private vengeance, it could not be possibly in furtherance of the common intention for which others can be liable. But if on the other hand he killed B bona fide believing that he was A and the common intention was to kill A the killing of B was in furtherance of the common intention. All the three accused in the present case were lying in wait and assaulted the driver of the first cart and stabbed him in pursuance of their pre-arranged plan. Therefore, all the three accused including the appellant must share the liability of murder under Section 302 read with Section 34 of the Indian Penal Code. Further, in view of the finding that the pre-concerted plan was to cause injuries to the in-

tended victim with dangerous weapons with which the assailants were lying in wait, the liability of the appellant is established.

16. The conclusion of Mehta, J., is correct. The appeal, therefore, fails and is dismissed. The accused must surrender to the bail and serve out the sentences.

Appeal dismissed.

1970 CRI. L. J. 1142 (Vol. 76, C. N. 283) =
AIR 1970 SUPREME COURT 1279 (V 57 C 268)
(From Allahabad)

A. N. RAY AND I. D. DUA, JJ.

State of U. P., Appellant v. K. K. Gupta, Respondent.

Criminal Appeal No. 221 of 1967, D/- 10-3-1970.

Criminal P. C. (1898), Section 561-A — Quashing of proceedings — Accused charged under Section 161, Penal Code read with Section 5 (2), Prevention of Corruption Act — Matter pending for six years in trial Court — Delay caused mainly by applications made by parties, mostly by the accused and once by the State, at different stages for transfer of the case, stay of proceedings and revision of orders — High Court making order for stay of proceedings on revision application by State challenging order passed by Trial Court requiring State to disclose the report sent to obtain sanction of the prosecution — Pending stay, and revision petition High Court quashing proceedings under Section 561-A without assigning reasons — Held in the circumstances High Court was wrong in quashing the proceedings. Decision of High Court, Reversed. (Para 10)

The following Judgment of the Court was delivered by

RAY, J.:— This is an appeal by special leave from the order dated 18th April, 1967, passed by the High Court at Allahabad.

2. The High Court quashed the proceedings in case No. 24 of 1961.

3. The order was made on the petition of the respondent under Sec. 561-A of the Criminal Procedure Code. The respondent made an application on 20th March, 1967, to the High Court at Allahabad. The respondent was charged with

an offence under Section 161 of the Indian Penal Code read with Section 5 (2) of the Prevention of Corruption Act. The incident in question was alleged to have taken place on 6th August, 1960. The respondent alleged that the charge sheet was submitted in the month of March 1961, and during six years only witnesses were examined and the examination of 16 more witnesses would therefore take 20 years. It was also alleged that 40 dates had been fixed for hearing of the case but to no useful purpose. The High Court quashed the proceedings without giving any reason therefor.

4. At the outset it may be said that it is difficult and embarrassing for this Court to discern the reasons which weighed with the High Court in making the order.

5. The State made an application under Article 134 (1) (c) of the Constitution for leave to appeal to this Court against the order quashing the proceedings. In dismissing that application the High Court said that since the submission of the charge-sheet in the year 1961 the case was not proceeded with either because of non-availability of Special Judge or because of adjournments taken by the prosecution or of the prosecution filing a Criminal Revision in the High Court resulting in stay of proceedings and further that the contentions had been controverted in the counter-affidavit with the result that it was a disputed matter which could not be decided in a summary application.

6. The State in the application for special leave filed in this Court made the following allegations. The respondent was charged with the offence of receiving illegal gratification. The alleged occurrence was on 6th August, 1960. The charge-sheet after investigation was filed on 29th April, 1961. The case was fixed for the statement of the respondent in the month of January, 1962, after copies of documents upon which the prosecution wanted to rely had been furnished to the respondent. The respondent in the month of January, 1962, moved an application before the High Court for quashing the proceedings on the ground that the investigation was not legal and there was a stay of proceedings. On 10th May, 1962, the High Court at Allahabad dismissed the application by stating that the legality of investigation could be decided only after examining such witnesses as the prosecution might like to produce.

On 28th July, 1962, the prosecution applied before the Magistrate for examination of witnesses. The respondent then moved a transfer application before the High Court and the proceedings were again stayed. On 9th August 1962, the order for stay of proceedings was received by the Trial Court. The transfer application was ultimately rejected by the High Court on 30th November, 1962, and the order was received in the Trial Court on 5th December, 1962. The respondent again moved two applications for transfer of the case to Allahabad. The applications were rejected and the case was fixed for hearing on 31st July, 1963. The respondent obtained an adjournment on the ground that his counsel had gone to Allahabad. The case was adjourned till 28th August, 1963. The respondent on that date asked for an adjournment on medical ground. The case was fixed for hearing on 10th September, 1963. Three prosecution witnesses were examined on that day. The respondent raised an objection as regards the validity of the investigation but the same was disallowed. The case was fixed for hearing again on 21st October, 1963, when the respondent was to be examined. The respondent did not turn up on medical ground. He was examined on 2nd December, 1963 and the charge under Section 161 of the Indian Penal Code read with Section 5 (2) and Section 5 (1) (d) of the Prevention of Corruption Act was read over to the respondent.

7. The examination of the prosecution witnesses commenced on 9th March, 1964. Cross-examination of the witnesses was deferred at the request of the defence counsel. The Special Judge trying the case died meanwhile. The case was again taken up on 26th October, 1964. A witness was produced on that date. The respondent asked for the report from the prosecution. The prosecution claimed privilege under Section 124 of the Evidence Act. The Trial Court held that it was not a privileged document and allowed the request of the respondent by its order dated 10th December, 1964. Two more witnesses were thereafter examined.

8. The State Government filed a revision application against the order of the Trial Judge dated 10th December, 1964, and the proceedings were stayed. The respondent moved an application for transfer of the case to the Lucknow Bench of the Allahabad High Court. The revision application filed by the State

Government is still pending in the High Court, though the High Court passed an order for hearing the case with expedition as soon as the record arrived at the High Court. The respondent then moved an application in the High Court under Section 561-A of the Criminal Procedure Code for quashing the proceedings. That is the application which resulted in the order forming the subject-matter of the present appeal. The State filed an affidavit in answer to the application of the respondent for quashing the proceedings. The State narrated the sequence of events which took place. The respondent in the application did not disclose all the facts relating to the various applications made by the respondent. It is apparent that the respondent, from time to time, made applications for staying the proceedings, preventing the case from being proceeded with. It is true that there has been delay but that is caused mainly by applications made by the parties mostly by the respondent and once by the State at different stages for transfer of the case, stay of proceedings, revision of orders and quashing of proceedings.

9. The ground given by the respondent in the application that only 4 witnesses were examined and it would take 20 years to examine the 16 witnesses is not supported by facts.

10. It is noticeable that the High Court made an order for stay of proceedings on the revision application filed by the State challenging the order dated 10th December, 1964, passed by the trial Court requiring the State to disclose the report sent to obtain sanction of the prosecution. Though the said application is still pending in spite of an order of the High Court to hear the application with expedition after arrival of the record, the High Court passed an order quashing the proceedings without consideration of these features.

11. The High Court was wrong in quashing the proceedings. The order of the High Court is set aside. The High Court will dispose of the revision application which is pending and then send the records to the trial Court as quickly as possible for expeditious trial of the case.

Appeal allowed.

nal Procedure Mst Kartar Kaur admitted that that was correctly recorded but denied the truth of it saying that it was given under police pressure. The learned Sessions Judge relied upon the statements of Mohinder Singh and that of Kartar Kaur before the committal court and convicted both the father and the son. The High Court did not accept the earlier statement of Kartar Kaur, for the reasons which will soon appear, and therefore acquitted Kartar Singh because he had taken no share in the affan. Kartar Kaur had earlier stated that he had fired the pistol but later resiled from that statement. As no other part was attributed to Kartar Singh the High Court felt that he was not involved in the murder and only his son Gurjant Singh was responsible.

7. We shall first deal with the appeal of Gurjant Singh against his conviction and sentence of death.

8. The prosecution case against Gurjant Singh has been accepted by the High Court and the Court of Session. Ordinarily this Court does not consider evidence for the third time when a concurrent finding has already been reached by the High Court and the Court of Session. However, as there was an appeal against the acquittal of Kartar Singh and the evidence was read to us in that connection we have been able to appraise it in relation to Gurjant Singh also. Our conclusion is that the case against Gurjant Singh is amply proved. There are other pieces of evidence which the High Court rejected, in our opinion, wrongly. If those are added to the evidence already accepted against Gurjant Singh they leave no room for doubt (if there was one) that he was the person who committed the seven murders on that fateful night. Before we summarise the case against Gurjant Singh we wish to consider the evidence which was discarded by the High Court in relation to his case and the appeal against Kartar Singh.

9. Testimony of three witnesses was rejected by the High Court. The first is Kartar Kaur, the full sister of Kartar Singh, the second her son Ranjeet Singh and the third Samandar Singh (P. W. 6). The evidence of Kartar Kaur in the Committal Court was brought upon the record of the Sessions trial, as Ex E-14 and the evidence of Ranjeet Singh before the Committal Court was brought on the record of the trial court as Ex E-17. When these documents were admitted in evi-

dence, counsel for the defence did not object to their being read. In the High Court, however, attempt was made to get rid of the statements by saying that they were inadmissible, since the provisions of Section 145 of the Indian Evidence Act were not complied with. In our judgment, there was enough compliance with Section 145 of the Evidence Act and the High Court erred in not reading these earlier statements for what they were worth. When these two witnesses were examined in the committal court, they gave a clear version involving the two accused in the case. The statement of Mst Kartar Kaur was that Gurjant Singh and his father Kartar Singh came to the house of Dayal Singh and Gurjant Singh called aloud to Dayal Singh to open the door. The door was opened and father and son entered. At that time Gurjant Singh was carrying a sword. She stated quite clearly that Gurjant Singh attacked her father Dayal Singh and later her step-mother Phinno. She also said that Kartar Singh had also entered with Gurjant Singh and Kartar Singh fired a firearm when Gurjant Singh was caught by Mohinder Singh. She also stated that Mohinder Singh was wounded by Gurjant Singh and then she ran out of the house in the company of Mohinder Singh. These clear statements were completely denied by her when she came to the Court of Session. Her effort then was to make it appear that the persons who had entered the house had muffled their faces and she could not identify them. She also said that she had not seen anything in the hands of those persons. In fact she did not say that there were two persons at all but only one. She was declared hostile and was allowed to be cross-examined by the Public Prosecutor. The Public Prosecutor read to her the whole of her statement before the Committal Court and asked her whether it was her statement. She admitted that it was a true record of what she had stated before the Committal Court, but she said that it was a false statement given under 'police pressure'. The objection taken to the admissibility of the statement was that every single passage which differed from her testimony in the Court of Session was not put to her with a view to affording her an opportunity of explaining why she had made a contrary statement. No doubt, if there were some passages here and there which differed from her later version, that procedure

would have been necessary. Here the witness admitted that her statement was truly recorded in the Committal Court. She only denied that it was a true statement because she said that she was made to depose that way by the police. It would have been useless to point out the discrepancies between the two statements because her explanation would have been the same. In these circumstances, the requirements of Section 145 of the Indian Evidence Act were fully complied with and the earlier statement could be read as evidence in the Sessions Trial.

10. The same was the case with Ranjeet Singh. He had also given a graphic account of how Gurjant Singh had met him at his field and had confessed to him that he was coming after murdering Dayal Singh and the whole family. Gurjant Singh said that he was hungry and therefore he was brought home. As he was feeling cold a fire was lit and Gurjant Singh began to warm himself. Then he asked for hot water so that he (Gurjant Singh) could take a bath. He also asked Ranjeet Singh to prepare some tea. When tea was being prepared Gurjant Singh put his chaddar, shirt and a shoe in the fire. Ranjeet Singh on getting the smell came and asked what was being burnt and was told that he (Gurjant Singh) had burnt his clothes which were blood-stained. When Gurjant Singh fell asleep, Karnail Singh father of Ranjeet Singh informed the Lamberdar and the sarpanch and they came and caught Gurjant Singh and handed him over to the police. In the Court of Session Ranjeet Singh completely denied the statement. He was confronted with this statement and it was read over to him in extenso. He also admitted that was a true record of what he had stated in the Committal Court but that it was false and was given under 'police pressure'. In our judgment, there was sufficient compliance with Section 145 of the Indian Evidence Act in his case also. It would have been pointless to draw his attention to each sentence and ask his explanation because the explanation would have been the same that it was false and given under pressure of police.

11. It may be pointed out that these two witnesses also made a statement under Section 164 of the Code of Criminal Procedure. These statements were, of course, not evidence but were corroborative of what had been stated earlier in the Committal Court. The attention

of the witnesses was drawn to passages from those statements also and their explanation only was that they were made under 'police pressure'. In our judgment the High Court was in error in not reading the statement of Ranjeet Singh made before the Committal Court and considering it as part of the evidence in the case.

12. Samandar Singh (P. W. 6) was the third witness to be disbelieved. His statement was that he heard the report of a pistol shot and climbed his roof. He saw in the house of Dayal Singh a light burning and also that something was happening as there were shouts of 'bachao' 'bachao' from that direction. He saw Kartar Singh and Gurjant Singh coming out of the house of Dayal Singh. Gurjant Singh had a naked sword in his hand and Kartar Singh had a white mare with him. That mare belonged to Fazal Deen. He accosted them but they did not stop and told him to go away lest he should be killed. Both the father and the son had not covered their faces. He saw them go away on the mare. He followed them for some 70 to 80 paces and then turned back and went to the house of Dayal Singh and saw the dead body of a woman lying in the courtyard. He went to Fazal Deen but did not find him. He then returned to his own house which was next to Dayal Singh's house and found Prema, Gurdeep and other persons there. He told them that Kartar Singh and Gurjant Singh had gone away with the mare. He also saw Mohinder Singh who was wounded. The evidence of this witness was curiously disbelieved by the High Court because the report of the pistol shot was not heard by Fazaldeen and Gurdeep Singh. It is often the case that the report of a firearm at night is heard by some persons and not by others. It depends on the fact that some persons are awake and some are asleep. It is obvious that Samandar Singh was awake that night because he was at the house of Dayal Singh soon afterwards. Perhaps lying awake and as his house was next door he heard the report of the pistol shot and also the cries from Dayal Singh's house. There is nothing unnatural in the statement made by Samandar Singh and we do not see any reason to disbelieve him. Another reason given by the High Court was that Samandar Singh claimed to have followed the father and the son for 70 to 80 paces and that would not be natural since it was night time and the other two were armed. It may be that Samandar

Singh, who was a police-servile, claimed that he was following the suspects merely to earn a name for himself. But we do not think that his whole testimony is false because his statement that there was a pistol shot was corroborated by Mohinder Singh and by Kartar Kaur in her statement before the Committal Court. The story of pistol shot was disbelieved by the High Court because it was not mentioned to Fazaldeen and Gurddeep Singh by Mohinder Singh and did not figure in the First Information Report. The First Information Report was made not by one of the persons immediately concerned but by a person who had the information from another. In these cases, sometimes, a fact gets omitted which should have been mentioned. Fazaldeen and Gurddeep Singh had stood by the First Information Report although there was no mention in it about the pistol shot. This was noticed by the High Court. In these circumstances the suspicion should have fallen on the correctness of the statements of Fazaldeen and Gurddeep Singh rather than on the statements by Mohinder Singh, Kartar Kaur and Samandar Singh.

13. No doubt Kartar Kaur and Ranjeet changed but it must be remembered that Kartar Kaur and Ranjeet Singh were immediately related to Kartar Singh. Kartar Kaur was his full sister and Ranjeet Singh was her son. They were favourably disposed towards Kartar Singh and his son Gurjant Singh. Although they had made truthful statements under the shock of what had happened they were trying to save them by denying their statements in the Committal Court. It would be impossible to think that police could exert pressure to make successive statements to the police, then to the Magistrate under Section 164 and then to the Committal Court. It is obvious that pressure was exercised the other way by Kartar Singh and Gurjant Singh and the earlier statements were denied to save them.

14. When these statements are thrown in, the case against Gurjant Singh remains amply proved. Apart from the evidence of eye-witnesses, namely, Mst. Kartar Kaur and her brother Mohinder Singh, there is the evidence of Samandar Singh that he was seen going away. In support of this evidence there is the extra-judicial confession of Gurjant Singh to Ranjeet Singh when he met him at the latter's

village. We are completely satisfied that this confession was made. The circumstantial evidence of burning the chaddar, shirt and the shoe clearly demonstrates the guilt of Gurjant Singh. It must be remembered that a safa and an odd shoe were found at the spot near the body of Mst. Phummo. Mohinder Singh identified them as the shoe and safa of Gurjant Singh. The High Court has accepted this evidence and we see no reason to disbelieve Mohinder Singh who was the identifying witness. Then there is the discovery of the sword with human blood-stains on it and his pullover which was also found to be stained with human blood. The fact that Gurjant Singh was apprehended from a place far away from the place where the murders took place also shows that he had run away from the place of murder to seek shelter elsewhere. The evidence against Gurjant Singh is complete and we are convinced that the prosecution case put up against him has been fully brought home to him. We are further convinced that for the reasons given above statements made by Kartar Kaur and Ranjeet Singh before the Committal Court are true and they fully support the conclusion that Gurjant Singh has been rightly convicted and sentenced. His appeal will be dismissed.

15. This brings us to the appeal against Kartar Singh. We have already stated that we think that the statement of Mohinder Singh about the firing of the pistol by Kartar Singh is corroborated by the earlier statements of Mst. Kartar Kaur and the statement of Samandar Singh who heard the report of the firing of the pistol. At the scene of the murder a live cartridge of 303 bore was found. Later Kartar Singh made a statement to the police and as a result of that statement a pistol and 18 live cartridges of the same bore were dug out from the ground. These corroborate the evidence of Mohinder Singh and of Kartar Kaur that Kartar Singh had a pistol in his hand and he fired it to force Mohinder Singh to release Gurjant Singh with whom he was grappling. The presence of the cartridge on the scene of the murder connects Kartar Singh and lends sufficient corroboration to the statement of the eye-witnesses to make the guilt brought home to him. The High Court was in error in thinking that Kartar Singh did nothing in the matter and was a silent spectator. It is impossible to think that Kartar Singh would stand aloof and let

his son commit as many as seven murders including the murder of his (Kartar Singh's) own father and not do anything to prevent his son unless he himself had connived and was a party. It is clear from the evidence that Kartar Singh and Gurjant Singh had come together. They were both armed and both went away together. The pistol was in fact fired and at the site of the offence a live cartridge was found which matched with the pistol and the other live cartridges dug out from the ground as a result of a statement made by Kartar Singh. We believe Samandar Singh's statement that he saw these two go away together, as indeed he must have, after the assault on the family had been made. On the whole the case against Kartar Singh is also proved. He did not do anything to murder these persons but he certainly was there with Gurjant Singh and both were of the same mind in doing away with the family of Dayal Singh including Dayal Singh himself. We are satisfied that the case stood proved against him as well.

16. We allow the appeal of the State of Rajasthan against Kartar Singh and convict him under Section 302/34, I. P. C. He was awarded a sentence of death by the learned Sessions Judge but, we think, that as his part in the seven murders, was secondary, it would be sufficient if the sentence of life imprisonment is imposed upon him. Kartar Singh is therefore convicted under Section 302/34, I. P. C. and is sentenced to undergo rigorous imprisonment for life. If he is not in custody he shall be arrested forthwith and committed to prison to serve out his sentence.

Appeal against acquittal of one of accused allowed and appeal against conviction of another accused dismissed.

(A) Evidence-Act (1872), Section 9 — Identification evidence — Nature of — Identification parades — Essentials — Value of identification evidence:

Facts which establish the identity of an accused person are relevant under Sec 9. As a general rule, the substantive evidence of a witness is a statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in Court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162, Cr. P. C. (Para 7)

Held on facts that the test identification parades in the case could not be considered to provide safe and trustworthy evidence on which the conviction of accused could be sustained (Para 14)

(B) Constitution of India, Article 136 — Supreme Court will not ordinarily inter-

1970 CRI. L. J. 1149 (Vol. 76, C. N. 285) =
AIR 1970 SUPREME COURT 1321 (V 57 C 278)

(From Allahabad)

A N RAY AND I. D. DUA, JJ.

Budhsen and another, Appellants v.
State of U. P., Respondent

Criminal Appeals Nos. 199 and 200 of
1969, D/- 6-5-1970.

FN/FN/C372/70/RGD/P

ference with conclusions of fact properly arrived at by High Court on appreciation of evidence except where there is legal error or some disregard of the forms of legal process or violation of principles of natural justice resulting in grave or substantial injustice — Entire case depending on identification of accused found on test identification parades — High Court not appreciating evidentiary value of parades — High Court proceeding on erroneous legal assumption that it is substantive evidence and on basis of such evidence alone conviction can be based — Court also ignoring important evidence in regard to manner of identification parades and other connected circumstances — Supreme Court will discard such legally infirm evidence of identification: S. C. Case law Ref. Judgment of Allahabad High Court, Reversed. (Paras 17, 18)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 1079 (V 57) =

(1970) 1 SCC 235, G. V. Subbrayanam v. State of Andhra Pradesh 17

(1970) Criminal Appeal No. 62 of 1968, D/- 26-3-1970 = (1970) 1 SCWR 698, Raja Ram v. State of Haryana 17

(1965) Criminal Appeal No. 129 of 1963, D/- 10-8-1965 (SC), Brahmin Ishwar Lal Munilal v. State of Gujarat 16

(1965) Criminal Appeal No. 120 of 1964 D/- 19-3-1965 = 1966 Mah LJ 12, Mahbub Beg v. State of Maharashtra 16

(1964) Criminal Appeals Nos 81, 112 and 132 of 1964, D/- 23-10-1964 (SC), Tej Narain v. State of U P 16

(1960) AIR 1960 SC 500 (V 47) = (1960) 2 SCR 460, Anant Chintaman Lagu v State of Bombay 16

The following Judgment of the Court was delivered by

DUA, J.:— These two appeals by special leave arise out of a joint trial of the present appellants and Jagdish and Sugriv. All the four accused were convicted by the trial Court; the present appellants were sentenced to death under Section 302 read with Section 34, Indian Penal Code and Jagdish and Sugriv to life imprisonment under Section 302 read with Section 109, Indian Penal Code. They challenged their conviction by separate appeals to the Allahabad High Court. By means of a common judgment the High Court dismissed the appeal of the present appellants (Crl App No. 2623 of

1968) and allowed that of their co-accused Jagdish and Sugriv (Crl. App No. 2648 of 1968). The sentence of death imposed on the present appellants under Section 302, Indian Penal Code for the murder of Lala Hazarilal was confirmed.

2. According to the prosecution story Jagdish and Sugriv related to each other as cousins belonged to village Bidrika. They used to harass the poor inhabitants of that village whereas deceased Hazarilal used to espouse their cause. As a result, there was not much love lost between Jagdish and Sugriv on the one side and Hazarilal on the other. Some years ago Jagdish, along with some others, was prosecuted for forging accounts of a Co-operative Society and was found guilty by the Assistant Sessions Judge, though released on probation under the U. P. First Offenders' Probation Act. Bhoodev, at whose instance, that prosecution was initiated presented a revision petition in the High Court against the order of the Assistant Sessions Judge challenging the benefit given to Jagdish under the U. P. First Offenders' Probation Act. The High Court allowed the revision on July 26, 1967 and imposed on Jagdish a substantive sentence of rigorous imprisonment for two years. Bhoodev had the support of Hazarilal in the trial Court and the revision to the High Court was also preferred by him at the instance of Hazarilal. This further enraged Jagdish and Sugriv and Jagdish is stated to have threatened Hazarilal with death about ten days before his murder. This happened before Jagdish was taken into custody pursuant to the order of the High Court imposing on him the sentence of imprisonment. This was alleged to be the immediate motive for Hazarilal's murder. In 1962 also Jagdish and Sugriv had been prosecuted by Hazarilal under Section 452/326 and Section 147, Indian Penal Code but they were acquitted. Ever since then, according to the prosecution, Jagdish and Sugriv had been harbouring ill feelings towards Hazarilal and planning to have him murdered through hired assassins. On September 11, 1967, Ghasiuddin (P. W 2) is stated to have gone to the house of Jagdish and saw Jagdish and Sugriv in the company of four unknown persons and over-heard Jagdish saying that the said four persons had left the job unfinished though they had visited the village often and telling them that the balance would be paid to them only after the job was accomplished. The following day at about 10 a. m. when it was driz-

zling Hazarilal was sitting in his Gher also described as Nohra on a cot and his brother Inderjit (P. W. 1) and Kanwar Sen (P. W. 3) were squatting on a heap of fodder nearby. They were all sitting in the Duari because that was the only place which provided protection against rain. Suddenly four unknown persons entered the Nohra through the Duari. Two of them caught hold of Inderjit and Kanwar Sen, one of them sat on the cot of Hazarilal and pressed his legs and the fourth who was carrying a red jhola in his hand, took out a pistol from the jhola and fired at Hazarilal from point blank range. Hazarilal fell down. The fourth man reloaded his pistol and fired another shot which hit Hazarilal on the chest killing him instantaneously. Inderjit and Kanwar Sen raised alarm. On hearing their alarm and the sound of pistol fire, Ram Singh, Imam Khan and Ranchor (P. W. 4) came to the scene of occurrence and saw the four assailants running away from the Nohra. According to the prosecution, the four unknown assailants murdered Hazarilal at the instigation of Jagdish and Sugriv. First information report was lodged by Inderjit at police station Iglas, about ten miles away from the place of occurrence at 2.35 p.m. the same day (September 12, 1967). On his return from the police station Inderjit met Ghaziuddin (P. W. 2) from whom he learnt what he (Ghaziuddin) had seen and heard a day previous at the house of Jagdish. S. K. Yadav, Sub-Inspector with whom the F. I. R. was lodged reached the scene of the occurrence at 6.15 p.m. the same day. He found one discharged cartridge and two wads at the place of the occurrence. He recorded the statements of some witnesses, including Ghaziuddin on the following day. Further Investigation was conducted by Sub-Inspector Harcharan Singh (P. W. 21). Jagdish and Sugriv on whom suspicion had fallen were not traceable with the result that warrants for their arrest were made over to Sub-Inspector Yadav. Proceedings under Sections 87 and 88, Criminal Procedure Code were started against them but soon thereafter they surrendered themselves in Court on September 29, 1967. During investigation the Investigating Officer learnt about the complicity of the present appellants and Naubat was arrested on October 9, 1967. Budhsen, however, was arrested in connection with some other case on October 14, 1967 by Sasni police. Magistrate Pratap Singh (P. W. 20) held

identification parade of Naubat on October 21, 1967 and of Budhsen on October 28, 1967.

3. The trial Court came to the conclusion that Jagdish and Sugriv had abetted the murder of Hazarilal and appellants Naubat and Budhsen had committed the murder. Naubat and Budhsen were, therefore, sentenced to death and Jagdish and Sugriv to life imprisonment.

4. On appeal the High Court re-summoned Lakhan Singh, Head Constable of Thana Sasni, District Aligarh, who had already appeared at the trial as P. W. 14 and recorded his additional statement. Lakhan Singh had taken Budhsen in custody at police station Sasni. His statement as P. W. 14 left some doubts in the minds of the Judges of the High Court to clear which it was considered necessary to examine him again in the High Court. After considering the entire evidence the High Court acquitted Jagdish and Sugriv but maintained the conviction and sentence of Budhsen and Naubat, appellants. The statement made by Ghaziuddin, (P. W. 2) was not believed by the High Court and his version was described as unnatural and improbable. That Court also ignored the evidence of Chandrapal (P. W. 5), Girendra Pal Singh (P. W. 7) and Lakhanpal (P. W. 8) on the ground of their being either irrelevant or unreliable. The existence of inimical relations between Jagdish and Sugriv on one side and Hazarilal on the other was not considered to be a sufficiently strong circumstance against Jagdish and Sugriv so as to hold them guilty of instigating Hazarilal's murder. As against Naubat and Budhsen, appellants in the opinion of the High Court primary evidence consists of their identification by some of the witnesses. The Court took into consideration the identification parade for Naubat held by Magistrate Pratap Singh on October 21, 1967 and that for Budhsen on October 28, 1967. It was principally the evidence of identification on which reliance was placed for holding the present appellants to be responsible for the murder of Hazarilal. The three witnesses on whose evidence in regard to the identification the High Court relied are Inderjit, Kanwar Sen and Ranchor. The additional evidence recorded by the High Court consisted of the statement of Lakhan Singh. That Court also inspected the original entries in the general diary of the police as well as their carbon copies. Lakhan Singh stated in the additional evidence that he had made entry at sl. no. 9

of the general diary of the original report under Section 307, Indian Penal Code and Section 25 Arms Act made by Pannal against Budhsen (Ex. Ka 10). He denied that blank space had been left in the general diary for entering the particulars of the pistol (tamancha) and cartridges etc. In regard to this denial in Lakhan Singh's statement the High Court observed that the weapon of offence with which the offence under Section 307, Indian Penal Code was said to have been committed by Budhsen was probably a later addition though the Court did not consider it proper to record a firm finding to that effect. A major part of the judgment of the High Court is confined to the evidence in regard to the identification parade and to the question whether the identifying witnesses had an opportunity of seeing the appellants before their identification. Holding that there was no opportunity for those witnesses to see the appellants before their identifications the Court confirmed their conviction and sentence as already observed.

5. In this Court Shri Sangi and Shri K Baldev Mohita addressed us in support of the appeals of their respective clients Naubat and Budhsen. According to their submission the evidence in regard to the identification parades is of an extremely weak character and is wholly uninspiring. According to them it does not bring home to the appellants the offence of murder beyond reasonable doubt. It was also urged that according to the prosecution evidence four unidentified persons having participated in the unfortunate murder of Hazarilal there is no reliable evidence showing that any one of the present appellants actually fired the fatal shot. Evidence regarding any specific part played by the appellants they contended is also not forthcoming on the record. On this ground it was emphasised that in any event the extreme penalty of death is uncalled for.

6. Since according to the High Court the primary evidence against the appellants is that of their identification by the witnesses the crucial point seems to us to be the admissibility and value of the evidence regarding the identification of the appellants. We accordingly consider it necessary, on the facts and circumstances of this case, to examine that evidence. The High Court, as already observed by us, has ignored the evidence of Chandrapal (P. W. 5) Girendrapal (P. W. 7) and

Lekhranj (P. W. 8) as either irrelevant or unreliable. The identification of the appellants is thus confined to the testimony of Inderjit Singh (P. W. 1), Kanwar Sen (P. W. 3) and Ranchor (P. W. 4). Turning first to the evidence of Inderjit it is important to bear in mind that he claims to be present at the time of the alleged occurrence along with Kanwar Sen. He also lodged the first information report at 2-35 p.m. on the day of the occurrence. In the report, this is what P. W. 1 stated in regard to the identification of the alleged assailants and the respective parts played by them in the commission of the offence:

"Today at about 10 O'clock in the day I and my brother Hazarilal and his partner (Sajhi) Kumar Sen son of Chidda Jatav of my village were present at the Gher, and it was raining a little, that four persons came to the Gher and out of them, one man sat on the cot near my brother and two persons caught hold of me and Kumar Sen and the fourth man having taken out the Katta (pistol) from inside the Jhola which he was carrying in his hand, fired shot at my brother Hazarilal. My brother jumped and fell down the cot, and he fired another shot at my brother, who had fallen down which hit Hazarilal at his chest as a result whereof he died. We both raised alarm. On hearing our alarm Imam Khan son of Lal Khan, Ranchor Jatav and Ram Singh tailor of my village also came up and then the accused persons having come out and ran away. These persons have also seen the four accused persons while coming out of the gher and running away. Jagdish and Sugriv having called, these four Badmashes have got committed the murder of my brother. We all can recognise these Badmashes on being confronted."

This description of the assailants could hardly provide the investigating authorities with any firm starting point from which they could proceed to take the necessary measures for the discovery and arrest of the alleged offenders as required by Section 157, Criminal Procedure Code. It is unfortunate that the Sub-Inspector S K Yadav, (P. W. 19) did not care to get more information about the description of the alleged assailants by questioning the informant. Of course, Jagdish and Sugriv were mentioned in the F. I. R. as the persons who had employed the four assailants for murdering the deceased but having been acquitted they do not concern us.

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SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN 1970 CRI. L. J. APRIL

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; Revers.=Reversed in.

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DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; REVERS.=Reversed in.

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cross examination, he states that he did not see the accused writing the portions which he says are in his hand writing. He has not seen him write documents or letters but he states significantly that he knew his handwriting. This evidence of P. W. 3 has been accepted by both the courts below. I see no ground to disbelieve his evidence also. On the evidence of P. Ws. 1, 2, 3 and 4 alone, the convictions can safely stand. But the learned Judge sought to use the corroborative evidence of the finger print expert, P. W. 13. Assuming I ignore the evidence of P. W. 13, I am still of the view that the convictions are unimpeachable on the evidence of P. Ws. 1 to 4 alone. In view of this finding, I need not elaborately deal with the validity of the acceptance of the evidence of the finger print expert. The learned Judge has given very sound reasons for accepting it. The only criticism made by Mr Vanamamalai was that in view of the principle laid down in the decision of Horwill, J., in Crown Prosecutor v. Gopal, AIR 1941 Mad 551, the expert had no opportunity of explaining to the Magistrate regarding the ten points of identity and therefore, there is no satisfactory proof that the writings in Exs. P. 7, P. 8, P. 16 and P. 17 are those of the accused. In my view the facts governing the case decided by Horwill J. constituted only one single piece of evidence bereft of other evidence for basing a conviction. Therefore, the learned Judge thought fit to express that the opinion of the expert based on eleven points of identity must have been explained to the magistrate. I think that, this decision is of no material assistance to the counsel for the petitioner in view of my acceptance of the evidence of P. Ws. 1 to 4.

4. The counsel fervently urged before me that the sentence of imprisonment awarded against the petitioner may be reduced to the period already undergone for the reasons (1) that he is a first offender, (2) that he is likely to be weeded out of the Co-operative institution and (3) that he is a pretty old man of 62 or 63 years nearly. I take these factors into consideration and I am inclined to hold that the ends of justice will be met by reducing the sentence of imprisonment to the period already undergone by him. The sentence of fine is however enhanced to Rs 1000 in the place of Rs 750. Time for payment is two months. With this modification regarding the sentence, the revision petition is dismissed.

Revision dismissed

1970 CRI. L. J. 433 (Vol. 76, C. N. 99) =
AIR 1970 ALLAHABAD 198 (V 57 C 29)

FULL BENCH

W. BROOME, B. D. GUPTA AND
G. C. MATHUR, JJ.

Khurkhur, Applicant v. State through the Asst. Engineer, P. W. D., Opposite Party.

Criminal Revn. No. 1492 of 1966, D/- 14-2-1969 against order of Addl. Dist. Magistrate (J.) Varanasi, D/- 25-7-1966.

(A) U. P. Roadside Land Control Act (10 of 1945), Ss. 13 (1), 3 — That area to which declaration under S. 3 (1) relates is a controlled area — Validity of, on ground of non-compliance with procedure prescribed by S. 3 (2) to (6) can be challenged by accused.

It is open to an accused person to question the validity of the declaration under sub-section (1) of S. 3 on the ground that the procedure prescribed by sub-sections (2) to (6) has not been followed, even though sub-section (7) makes the declaration conclusive evidence of the fact that the area to which it relates is a controlled area. (Para 6)

The presumption under Section 3 (7) can only arise when the "declaration made under sub-section (1)" referred to therein is a valid declaration made in accordance with law. A declaration made without following the procedure laid down in sub-sections (2) to (6) will not be a legally or duly made declaration; and only a declaration duly made will attract the application of sub-section (7). Since Section 3 (7) does not state that the publication of the declaration under sub-s. (1) shall be conclusive evidence of the fact that the declaration has been made in accordance with the provisions of the Act, it cannot be held to shut out enquiry into the question whether the provisions of sub-sections (2) to (6) were complied with or not before making the declaration. AIR 1966 SC 693, Dist. (Paras 3, 4)

(B) U. P. Roadside Land Control Act (10 of 1945), S. 3 — Declaration under sub-section (1) — Whether procedure prescribed under sub-sections (2) to (6) was followed — Proof of.

Where the declaration under sub-section (1) of S. 3 has been made and the accused person does not raise the question that the procedure prescribed by sub-sections (2) to (6) was not followed before making the declaration, it is not necessary for the prosecution to establish that the provisions of these sub-sections have been complied with. (Para 7)

Once a Gazette notification embodying the declaration is produced before the Court, the presumption can legitimately be drawn that all the procedure required by law to be followed with regard to the

GM/HM/C980/69/YPB/B

said notification has in fact been followed, vide illustration (e) to Section 114 of the Evidence Act. It is only in two classes of cases that the prosecution is called upon to produce evidence to prove that sub-sections (2) to (6) have been complied with: (1) cases in which the accused challenges the validity of the declaration specifying the alleged non-compliance, and (2) cases in which for some special reason the Court refuses to draw the presumption permitted by Section 114 of the Evidence Act. (Para 6)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 693 (V 53) =
1966-1 SCR 950, Municipal Board
Hapur v Raghavendra Kripal 4

Sankatha Rai, for Applicant; Sushil Kumar, D. G. A., for Opposite Party.

BROOME J.: Khurkhur, the petitioner in this criminal revision, has been convicted by the S. D. M. of Varanasi under Section 13 (1) of the U. P. Roadside Land Control Act, 1945, and has been sentenced to pay a fine of Rs 200, with a further recurring fine of Rs 20 per day in case of continuing contravention. He filed a revision in the Court of the A. D. M. (J) Varanasi, and there for the first time raised the plea that the Gazette notification dated 29-12-1951, relied upon by the prosecution for the purpose of showing that the area in question was a "controlled area", had not been made in accordance with law, because the State Government had not published a preliminary declaration in two vernacular newspapers, as required by sub-section (2) of S. 3 of the Act. The learned A. D. M. (J) repelled this argument on the ground that under sub-section (7) of S. 3 the notification was conclusive evidence that the area was a "controlled area" and that the prosecution was under no obligation to produce evidence to show that the procedure prescribed in sub-section (2) had been complied with before the notification was issued. Thereafter the present revision was filed in this Court and came up for hearing before S. D. Singh J., who being of opinion that it was desirable to obtain an authoritative interpretation of the scope of sub-section (7) of S. 3 of the Act, referred the following two questions to a larger Bench for decision—

"(1) Whether it is open to an accused person to question the validity of a declaration made under sub-section (1) of Section 3 of the U. P. Roadside Land Control Act, 1945 on the ground that procedure prescribed under sub-sections (2) to (6) of Section 3 of the Act was not gone through at all or in some material respect, even though the aforesaid declaration is made conclusive evidence under sub-section (7) of the same section of the fact that the area to which it relates is a controlled area.

(2) In case this question is answered in the affirmative, will it be for the prosecution to establish in every case that the procedure prescribed under sub-sections (2) to (6) of S. 3 of the Act was gone through before a declaration was made under sub-section (1) of S. 3 of the Act or the necessary onus to establish the want of compliance will lie on the accused."

The questions propounded by S. D. Singh, J. came up before a Division Bench of this Court, but that Bench, having discussed various rulings bearing on question of whether the provisions of sub-section (2) of S. 3 regarding publication in two vernacular newspapers were directory or mandatory, felt that consideration by a still larger Bench was required and that is how this revision has come before us.

2. As a matter of fact this whole controversy is totally unnecessary and pointless. On the face of it, it seemed to us highly unlikely that the State Government would have deliberately omitted to follow the procedure laid down in a section of the Act itself and accordingly we inquired from the learned Government Advocate what the factual position was, and the affidavit that was filed on 17-12-1968 in response to this query shows that in actual fact sub-section (2) of Section 3 of the Act has been fully complied with, inasmuch as the required notification was duly published in two vernacular newspapers, the 'Aaj' and the 'Qaumi Awaz', on 24-2-1950 and 23-2-1950 respectively. Copies of the newspapers in question, showing the publication of the notification, are appended to the affidavit.

3. However, as the questions have been referred to us for decision, we proceed to give our answers thereto. The first question relates to the scope of sub-sections (1) and (7) of S. 3 of the U. P. Roadside Land Control Act, which run as follows:—

3 Declaration of Controlled Area— (1) The State Government may, by notification in the official Gazette, declare any land within a distance of four hundred and forty yards from the centre line of any road to be a controlled area for the purposes of this Act.

(Provided that in the case of a national highway, the highway itself shall not be deemed to be a controlled area)

"... .."
(7) A declaration made under sub-section (1) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the area to which it relates is a controlled area.

At first sight it might seem that sub-section (7) was meant to endow the Gazette notification under sub-section (1) with special sanctity, preventing it from being challenged on any ground whatsoever. We are satisfied, however, that the presumption under sub-section (7) can only arise when the "declaration made

under sub-section (1)" referred to therein is a valid declaration made in accordance with law. Sub-section (2) of S. 3 provides:

"3 (2)— Not less than three months before making a declaration under Section (1) the State Government shall cause to be published in the official Gazette and in at least two newspapers printed in a language other than English a notification stating that they propose to make such a declaration and specifying therein the boundaries of the land in respect of which the declaration is proposed to be made and copies of every such notification or of the substance thereof shall be published by the Collector in such manner as he thinks fit at his office and at such other places as he considers necessary within the said boundaries."

Sub-section (3) provides for the filing of objections by a person interested. Sub-sections (4) to (6) provide for the disposal of objections. The Act empowers the State Government to make the declaration under sub-section (1) of S. 3 only after complying with the procedure prescribed by sub-sections (2) to (6). A declaration made without following the procedure laid down in these sub-sections will not be a legally or duly made declaration, and only a declaration duly made will attract the application of sub-section (7).

4. Sub-section (7) does not make the declaration under sub-section (1) conclusive evidence of the fact that it has been made in accordance with the provisions of sub-sections (2) to (6), nor does it shut out enquiry by the Courts into the legality of the declaration. In this respect the language of sub-section (7) may be contrasted with the language used in sub-section (3) of S. 135 of the U. P. Municipalities Act, which says—

135 (3) — A notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act."

Section 135 (3) purports to shut out a challenge to the legality of the imposition on the ground that it has not been made in accordance with the provisions of the Act. Even in respect of this provision the Supreme Court has held in *Municipal Board, Hapur v. Raghuvendra Kripal*, AIR 1966 SC 693 that the rule of conclusive evidence in this section does not shut out all enquiries by Courts into the validity of the notification under Section 135 (2), though defects in respect of directory provisions may have its protection. However, since the language of the two provisions is different, the decisions in respect of Section 135 (3) of the U. P. Municipalities Act are not particularly helpful in interpreting Section 3 (7) of the U. P. Roadside Land Control Act. Provisions analogous to those of Section 3 (7) are to be found in Section 6 (3) of the Land Acquisition Act,

which provides, in respect of a declaration under Section 6 (1), that

"the said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be,"

It has never been contended, nor has it been held by any Court that S. 6 (3) bars the declaration under Section 6 (1) from being challenged on the ground that it was made without following the procedure laid down in the Land Acquisition Act for making it. The rule of conclusive evidence in such cases applies only if the declaration has been legally and duly made. Since Section 3 (7) of the U. P. Roadside Land Control Act does not state that the publication of the declaration under sub-section (1) shall be conclusive evidence of the fact that the declaration has been made in accordance with the provisions of the Act, it cannot be held to shut out enquiry into the question whether the provisions of sub-sections (2) to (6) were complied with or not before making the declaration.

5. This conclusion will clearly be a sufficient answer to the first question referred to us for decision and we see no necessity to embark on a discussion of whether any of the provisions of sub-sections (2) to (6) of Section 3 of the Act are mandatory or directory since in our opinion that would be outside the scope of the question in the form in which it has been framed.

6. Having answered the first question in the affirmative, we have now to deal with the second. Learned Counsel for the petitioner has attempted to argue that in each and every case, whether or not the accused challenges the validity of the declaration made under sub-section (1), the prosecution is bound to place all the necessary material before the Court to show that the procedural requirements of sub-sections (2) to (6) have been complied with and that the declaration has been validly made in accordance with law. But we are unable to accept this sweeping proposition. Once a Gazette notification embodying the declaration is produced before the Court, the presumption can legitimately be drawn that all the procedure required by law to be followed with regard to the said notification has in fact been followed—vide illustration (e) to S 114 of the Evidence Act. It is only in two classes of cases that the prosecution is called upon to produce evidence to prove that sub-sections (2) to (6) have been complied with: (1) cases in which the accused challenges the validity of the declaration, specifying the alleged non-compliance, and (2) cases in which for some special reason the Court refuses to draw the presumption permitted by Section 114 of the Evidence Act.

7. Our answers to the questions propounded by the learned Single Judge

therefore, are:—

1. It is open to an accused person to question the validity of the declaration under sub-section (1) to S. 3 of the U. P. Roadside Land Control Act on the ground that the procedure prescribed by sub-ss. (2) to (6) has not been followed, even though sub-section (7) makes the declaration conclusive evidence of the fact that the area to which it relates is a controlled area
2. Where the declaration under sub-section (1) of S. 3 has been made and the accused person does not raise the question that the procedure prescribed by sub-sections (2) to (6) was not followed before making the declaration, it is not necessary for the prosecution to establish that the provisions of these sub-sections have been complied with

Reference answered accordingly.

1970 CRI. L. J. 436 (Vol. 76, C. N. 100) =
AIR 1970 ALLAHABAD 210 (V 57 C 32)
M. H. BEG. J.

New Victoria Mills Co Ltd., Petitioner
v. Presiding Officer, Labour Court and
others, Opposite Parties.

Civil Misc. Writ No. 1492 of 1966, D/-
12-7-1968.

(A) Criminal P. C. (1898), Ss. 242, 251-A, 254, 537 and 246 — Scope — Slight mistake in stating charge e.g. quoting wrong section — Mistake cannot vitiate trial — Industrial Employment (Standing Orders) Act (1946), Sch., Item 9.

In criminal trials to which the warrant case procedure is applicable under the Code of Criminal Procedure, a slight mistake or defect in a charge could not possibly vitiate the trial. The principle contained in Section 537 of Criminal P. C. would cure such a defect even in the proceedings of a regular criminal Court. In the trial of summons cases by Magistrates all that is required is that facts which constitute an offence should be put to the accused and either admitted or proved. Even if the allegation put to an accused at a summons case trial is that the facts put to the accused constitute an offence under a section which does not apply, the offender can still be punished under the provision properly applicable on facts proved as provided by Section 246.

If the particular facts alleged against an employee constituted misconduct, the mere insertion of a wrong provision while stating the provision of the Standing Order applicable could not possibly vitiate the charge or the trial itself: (1960) 2 Lab LJ 56 (SC) Ref

Where a wrong provision was introduced by merely inserting an additional letter indicating the particular head of the Standing Order sought to be applied, the error could not be said to be basic.

(Paras 6, 8, 9)

(B) Industrial Employment (Standing Orders) Act (1946), Sch., Item 9 — Misconduct — Meaning of — It is enough if alleged misconduct affects competence of employee for particular kind of work given to him — Misconduct by theft of property — Mere absence of evidence as to ownership of property could not make decision of domestic tribunal perverse.

The offence of theft, wherever theft is committed by an employee, shows that the employee is dishonest and his reliability as a worker may be affected for that reason. Such a defect in a sweeper who necessarily has access to residential premises of the employer and opportunities of committing theft is particularly dangerous. Therefore, a workman employed as a sweeper who has either been proved to have committed a theft or to have so acted as to facilitate or aid theft may very well be guilty of such misconduct as to merit dismissal. All that has to be shown is that the alleged misconduct affects the competence of the employee for the particular kind of work he does. The misconduct for which an employee can be dismissed need not necessarily have been committed in the course of his employment. It is enough if it is of such a nature as to affect his suitability for a particular employment. It is then reasonably connected with the question whether the workman can be retained in that employment. AIR 1965 SC 155 & AIR 1960 SC 806. Rel. on.

Held, that the absence of any evidence about the ownership of the property alleged to have been stolen could not make the decision of the domestic tribunal perverse.

(Paras 11, 9)

(C) Constitution of India, Arts. 20 (2) and 310-311 — Double jeopardy — Scope of 'Misconduct' is wider than that of criminal offence e.g. theft — Mere fact that case was sent to criminal Court could not bar domestic enquiry.

The charge in disciplinary proceedings is not identical with that at the criminal trial. The scope of 'misconduct' is wider than that of a criminal offence such as theft. Disciplinary proceedings cannot be equated with a criminal trial. It is doubtful whether the principle of propriety viz., that the disciplinary authority should not enquire into a charge of which the employee is already acquitted by a criminal Court, laid down for disciplinary proceedings against civil servants, would be applicable with equal force to proceedings before a domestic tribunal by an employer against an employee. Where the dismissal on the charge of misconduct

took place before the workmen were given the benefit of doubt and acquitted at the criminal trial under the Cri. P. C. the fact that the case was sent to a criminal Court could not bar a domestic inquiry: AIR 1962 Mys 84, Disting. (Para 12)

(D) Civil P. C. (1908), S. 11 — Object — Ground might and ought to have been taken, but not taken in Labour Court or earlier in High Court — Held, on applying principles of constructive res judicata, that ground could not be taken in High Court.

The principles of res judicata are quite wide and general in application. They are designed to prevent unending litigation and piecemeal re-agitation of the same dispute on different grounds before different or same Courts. Where the ground in question was open to the opposite parties in the Labour Court and on the earlier occasion in the High Court but they did not take it:

Held, that the ground might and ought to have been taken earlier and on applying the principles of res judicata, the party was precluded from raising the ground at that stage. (Paras 12, 13)

(E) Industrial Disputes Act (1947), Section 15 — Powers of Labour Court — It is only when Labour Court comes to conclusion that fair enquiry was not held, that it can enter into merits of case: AIR 1965 SC 155, Rel. on. (Para 15)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 155 (V 52) =
(1964) 7 SCR 555, Tata Oil Mills
Co. Ltd. v. The Workmen 11, 15
(1962) AIR 1962 Mys 84 (V 49),
P. E. Ponnuram v. Mysore
Govt. Road Transport 12
(1961) AIR 1961 SC 1129 (V 48) =
(1961) 1 Lab LJ 546, Central India
Coal Fields Ltd. v. R. B. Sobnath 3
(1960) AIR 1960 SC 806 (V 47) =
(1960) 3 SCR 227, Delhi Cloth
and General Mills Ltd. v. Kushal
Bhan 11
(1960) 1960-2 Lab LJ 56 = (1960-61)
12 FJR 138 (SC), Doom Dooma
Tea Co. Ltd. v. Assam Chah
Karamchari Sangha 7
T. N. Sapru, for Petitioner; J. N.
Tewari, for Opposite Parties.

ORDER:— The petitioner, the New Victoria Mills Ltd., Kanpur, prays for a writ of certiorari to quash the award of a labour Court dated 16-9-1966 (Annexure 27 to the writ petition) and consequential directions. The impugned award was given after this Court had caused, on 6-8-1963, in Civil Miscellaneous writ petition No. 2720 of 1959 connected with civil miscellaneous writ petition No. 2014/52, a previous award dated 26-6-1958 given by the same Labour Court adjudicating the same question between the same parties. Mr. Justice Dwivedi had ordered in that case:—

"I direct the Labour Court to re-hear

the dispute and decide the question of fair hearing in the light of my judgment."

The question for adjudication before the Labour Court was framed as follows:—

"Whether the employers have wrongfully and/or unjustifiably dismissed Sri Jagannath, son of Sri Kunji, T. N. 9, and Sri Chhotey, son of Sri Chhedi, T. N. 3, sweepers, with effect from February 7, 1967, if so, to what relief are the workmen concerned entitled?"

The employers had tried and found Jagannath and Chhotey, opposite parties 2 and 3, guilty on a charge framed as follows:

"Aap 6-11-1954 ki rat me ek baje sagar peshi me cement ki bori chorate hue pakade gaye aur usi samay aap police me bhi dediyе gaye. Aap jawab deejyе ke chori ki case men aap ke khilaf kyon na karwai kiya jai and thereby committed an act of misconduct under Standing Order 23 (D) (Theft)."

This charge framed in language which was a mixture of Hindi and English, as indicated above, certainly put the matter with which the accused were charged fairly and squarely to them in language which was quite intelligible to them. The questions which were argued before this Court on the previous occasion were whether the charge had been properly framed and whether the accused had been given a fair hearing. Dwivedi, J., who quashed the previous award, had observed in the course of his judgment: "I have already stated that the award is founded on the only ground that the domestic enquiry did not give fair hearing to the employees." After coming to this conclusion, Dwivedi, J. held that the charge contained full details of the misconduct alleged against the workmen. It was also held there that the Labour Court had proceeded on a number of irrelevant considerations in coming to the conclusion that the accused had not got a fair hearing.

2. In the award now assailed by the petitioner, the Labour Court has observed that the case had been sent back by this Court in order to determine whether there was a fair hearing before the domestic tribunal. After making this observation, the Labour Court, for some reason, made no effort whatsoever to decide the question of fair hearing and seems to have forgotten all about it. Perhaps the Labour Court was of opinion that the direction to rehear the dispute meant that the whole case was re-opened and could be decided entirely afresh on whatever grounds the Labour Court thought fit to take. I may observe that even if the Labour Court's assumption that every question was open to it for adjudication afresh could be justified, it should have given a decision on the question this Court had expressly directed it to decide. The order of this Court, as I understand it, was that, although the dispute is to be re-

heard, a fresh decision must be given, in any case, on the only question which was apparently raised before the Labour Court and before this Court on the previous occasion, that is to say, the question whether a fair hearing was given to the workmen by the domestic tribunal. Unfortunately, the labour Court has not given any reason for treating the whole case as open to it for re-adjudication without finding that the workmen did not get a fair hearing.

3. The labour Court held that a charge for misconduct brought by an employer against a workman need not be restricted to theft committed on the company's premises or during working hours of the operative. It relied on the decision of the Supreme Court in *Central India Coal Fields v. R. B. Sobnath*, AIR 1961 SC 1189 in order to decide issue No. 2 in favour of the employers. It was held in that case that improper conduct of an employee committed even outside the Company's premises and also outside the working hours could be misconduct under the standing orders. The Labour Court framed and decided an additional issue No. 2 against the workmen. Whether the Standing Orders of the concern were applicable to the workmen who are employed at the bungalows of the officers of the mills? Apparently, the workmen had raised the question whether a theft alleged to have been committed at the bungalows of the officers by employees could constitute misconduct within the meaning of that term as given in the Standing Orders. Although the Labour Court held that the Standing Orders would cover theft by a workman outside the Company's premises, it took the view that, there being no evidence that the cement stolen belonged to the Company, no charge for misconduct could be made out.

4. I have been taken through the written statements filed on behalf of the employers and the workmen before the Labour Court. The fresh question on which the Labour Court seems to have decided the whole case on this occasion, whether the cement alleged to have been stolen was the property of the Company or not, was not raised anywhere by the parties. The Labour Court, however, observed that the Managing Officer's bungalow on which the theft was committed was two and a half miles from the factory and did not belong to the factory. It practically negated the effect of its own finding that the Standing Orders applied to a case of theft outside the premises of the Company by introducing the condition that the theft had to be shown to be of the Company's property. It held that, as no evidence was produced at the domestic inquiry that the cement alleged to have been stolen was the property of the Company or that the theft was in connection with the Company's business,

there was no evidence whatsoever to support the charge of misconduct. In other words, the Labour Court construed the charge as confined to theft of the property of the Company or one committed in connection with the Company's business and misconduct as confined to such theft. It held the finding of the domestic tribunal to be "perverse" on the ground that there was no evidence at all about the ownership of the cement said to have been stolen.

5. It seems very doubtful whether the Labour Court could proceed at a tangent in this fashion at all at any stage to decide a question of fact which was not raised by the workmen either at their trial or before the Labour Court in their written statement. If the ownership of the property by the Company or its connection with the business of the Company was an essential ingredient of the charge of misconduct it might have been possible to say that the evidence in support of the charge could not constitute misconduct at all and that the finding of the domestic tribunal was perverse for that reason. In the case before me, the facts stated in the Hindi language and put to the employees could, if proved, constitute misconduct quite apart from the question whether the property stolen was that of the company or of an officer or director of the Company.

6. It is true that the charge mentions a provision of the Standing Order which only applied to a case of theft of the property of the Company or of property stolen in connection with the business of the Company. But, this provision was mentioned only in the part of the charge relating to the particular provision under which the alleged misconduct was supposed to be an offence. The factual ingredients of the charge of alleged misconduct were already put to the employees in Hindi. The only mistake in the charge was that the letter 'D' had been put within brackets after the words "Standing Order 23."

Even in criminal trials to which the warrant case procedure is applicable under the Code of Criminal Procedure, such a slight mistake or defect in a charge could not possibly vitiate the trial. In the trial of summons cases by Magistrates all that is required is that facts which constitute an offence should be put to the accused and either admitted or proved. Even if the allegation put to an accused at a summons case trial is that the facts put to the accused constitute an offence under a section which does not apply the offender can still be punished under the provision properly applicable on facts proved as provided by S. 246 of the Code of Criminal Procedure.

7. The Labour Court appeared to have misdirected itself with regard to the mean-

ing of the term "perverse" with reference to a decision. The Labour Court relied on *Doom Dooma Tea Co. Ltd. v. Assam Chah Karamchari Sangha*, 1960-2 Lab LJ 56 (SC) where the following grounds upon which the result of a trial by a domestic Tribunal could be set aside were given: "(1) when there has been want of good faith; (2) when there is victimisation or unfair labour practice; (3) when the management has been guilty of a basic error or violation of a principle of natural justice; and (4) when on the materials the finding is completely baseless or perverse." Mr. J. N. Tewari appearing on behalf of the opposite parties tried to justify the view taken by the Labour Court on the ground that the trial of the opposite parties by the domestic Tribunal was vitiated by a "basic error" and also on the ground that, on the materials on the record, the finding was completely baseless or perverse.

8. It has been conceded by Mr. Tewari that Standing Order 23 does not give a definition of misconduct at all but only gives instances of it. The Standing Order 23 begins as follows: "The following acts or omissions will be treated as misconduct." The Standing Order ends after mentioning various kinds of misconduct, with the words: "and any other misconduct." Thus, the language of the Standing Order itself shows that it does not define misconduct or illustrate it exhaustively. If the particular facts alleged, which were put to the employees in the Hindi language, constituted misconduct, the mere insertion of a wrong provision while stating the provision of the Standing Order applicable could not possibly vitiate the charge or the trial itself.

9. In this case, the wrong provision was introduced by merely inserting an additional letter indicating the particular head of the standing order sought to be applied. The principle contained in Section 537 of the Criminal P. C. would cure such a defect even in the proceedings of a regular criminal Court in a warrant case trial where charges have to be formally framed. The error could neither be basic nor could the absence of any evidence about the ownership of the property alleged to have been stolen make the decision of the domestic tribunal perverse. As already indicated, the view of the Labour Court is itself vitiated by basically and patently erroneous views about what constitutes a misconduct and the meaning of a "perverse" decision.

10. I may also mention that the award contains no discussion of any specific findings given by the domestic tribunal whose verdict was characterised as "perverse". On this occasion, the only ground upon which the award is really based is that the absence of evidence relating to the ownership of the cement alleged to have been stolen vitiated the whole trial and

made a finding of guilt for the charge of misconduct perverse. This raises the question of the meaning of "misconduct."

11. In *Tata Oil Mills Co Ltd. v. The Workmen*, AIR 1965 SC 155 it was held that although misconduct to be covered by the particular Standing Order placed before their Lordships had to be shown to be rationally connected with the employment of the offender the mere fact that alleged disorderly behaviour took place at a distance from the factory where the employees worked could not take the disorderly behaviour outside the purview of misconduct. In *Delhi Cloth and General Mills Ltd. v. Kushal Bhan*, AIR 1960 SC 806, an employee of the Company manufacturing textiles was dismissed by his employers for misconduct on the ground that he had stolen the bicycle of a clerk of the Company. It could be urged there also that the offence was committed outside the course of employment of the Company. The dismissal for misconduct was, however, not considered improper by their Lordships of the Supreme Court. In that case, the dismissal had taken place pending a criminal trial for theft in which the employee was finally acquitted. It was held that the Labour Tribunal could not assail the proceedings on questions of fact even though it is better for an employer to await the decision of a criminal Court in a grave case so that the defence of the employee in the criminal trial may not be prejudiced. But, theft of another employees' property was held to constitute misconduct justifying the dismissal. Presumably the offence of theft, wherever theft is committed by an employee, shows that the employee is dishonest and his reliability as a worker may be affected for that reason. Such a defect in a sweeper, who necessarily has access to residential premises of the employer and opportunities of committing theft, is particularly dangerous. Therefore, a workman employed as a sweeper who has either been proved to have committed a theft or to have so acted as to facilitate or aid theft may very well be guilty of such misconduct as to merit dismissal. All that has to be shown is that the alleged misconduct affects the competence of the employee for the particular kind of work he does. The misconduct for which an employee can be dismissed need not necessarily have been committed in the course of his employment. It is enough if it is of such a nature as to affect his suitability for a particular employment. It is then reasonably connected with the question whether the workmen can be retained in that employment.

12. Another question raised by Mr. J. N. Tewari was that the workmen, opposite parties 2 and 3, having been acquitted by a criminal Court on the charge of theft of cement, could not be tried by the domestic tribunal and dismissed for the

same offence. Learned counsel cited *P. E. Ponnuram v. Mysore Government Road Transport*, AIR 1962 Mys 84 where it was held that, if an offence punishable by a criminal Court is alleged against a civil servant and is actually sent to a criminal Court which acquits the civil servant, "it would be extremely improper for any disciplinary authority to inquire again into that charge and hold him guilty on the very evidence which was produced before the criminal Court and which it disbelieved" It was also held there "To permit that would be to countenance an improper circumvention of the order of acquittal made by a competent criminal Court" This was a case of disciplinary proceeding against a civil servant. An inquiry into the same charge was held to be improper although it could not be held to be illegal for contravening the principle contained in Art 20 of the Constitution. The charge in disciplinary proceedings is not identical with that at the criminal trial. The scope of "misconduct" is wider than that of a criminal offence such as theft. Disciplinary proceedings cannot be equated with a criminal trial. I also doubt whether this principle of propriety, laid down for disciplinary proceedings against civil servants, would be applicable with equal force to proceedings before a domestic tribunal by an employer against an employee. In the present case, the dismissal on the charge of misconduct took place before the workmen were given the benefit of doubt and acquitted at the criminal trial under the Criminal Procedure Code. The mere fact that the case was sent to a criminal Court could not bar a domestic inquiry. The Labour Court was only concerned with the correctness of the proceedings before the domestic tribunal. The main ground, however, on which I overruled this objection raised for the first time before me in this Court is that it was not raised at all either before the Labour Court or before this Court on the earlier occasion as it could have been done.

13. This brings me to the principle which should, in my opinion, be applied in such cases, quite apart from the opportunity which the opposite parties Jagannath and Chhotey had of raising such a plea before the Labour Court, this is the second occasion which the opposite parties have had of raising this question in this Court as an alleged bar to proceedings for dismissal by the employer. On the earlier occasion when this matter was considered by my learned brother Dwivedi, J. in this Court no such objection was taken at all. Even if it is an objection which was open at that stage, so that it might and ought to have been taken then, I would apply the principle of constructive res judicata and hold that the opposite parties cannot invoke this ground in this Court now. The principles of res judicata

are quite wide and general in application. They are designed to prevent unending litigation and piecemeal re-agitation of the same dispute on different grounds before different or same Courts. If the ground was open to the opposite parties on the earlier occasion in this Court and they did not take it, I think they are precluded now from raising it on this occasion before this Court.

14. As already observed, this Court had sent back the dispute for re-hearing and for decision of the question whether Jagannath and Chhotey, opposite parties 2 and 3, had a fair hearing before the domestic tribunal. That question ought to have been decided by the Labour Court in compliance with the orders of this Court, but it did not do so. Taking a charitable view of its error, it may be said that the Labour Court did not deliberately flout the orders of this Court but was under a misapprehension about the duty it was directed to perform.

15. It was only if the trial of Jagannath and Chhotey, opposite parties 2 and 3, was actually vitiated by a violation of principles of natural justice, so that it could be held that they did not get a fair hearing, that the Labour Court could enter into questions of fact itself and then decide them. As their Lordships of the Supreme Court have pointed out, in AIR 1965 SC 155 (Supra), the Industrial Tribunal can discard the findings of the domestic tribunal and give its own findings on questions of fact provided the proceedings before the domestic tribunal are vitiated by a basic error such as violation of principles of natural justice. In the present case, the only alleged basic error which was open for the Labour Court to adjudicate upon was whether the workmen had obtained a fair hearing before the domestic tribunal. It was only after it had arrived at the conclusion that they did not have a fair hearing that the Labour Court could have entered into merits of the case at all. The award of the Labour Court, however, contains no finding which could, so to say, open the door for entering upon a consideration of question of fact.

16. For the reasons given above, I quash the award of the Labour Court dated 16-9-1965 and issue fresh directions as follows: The Labour Court shall decide the specific question whether the opposite parties Jagannath and Chhotey had a fair hearing before the domestic tribunal. Only if it arrives at the conclusion that they did not have a fair hearing will it proceed to re-examine the facts relating to the alleged misconduct for itself. If it is able to and does re-examine the facts, it will bear in mind the meaning of "misconduct" as explained above. If the workmen had a fair hearing, it will not be

open for it to consider any other question.

17. There should be no room now for the Labour Court to misapprehend the orders of this Court. The parties will bear their own costs.

Petition allowed.

1970 CRI. L. J. 441 (Vol. 76, C. N. 101) =
AIR 1970 ALLAHABAD 235 (V 57 C 38)
K. N. SRIVASTAVA, J.

State of U. P., Appellant v. Janni and others, Respondents.

Govt. Appeal No. 1850 of 1965, D/-31-7-1968 against order of Magistrate 1st Class, Roorkee, D/-14-6-1965.

Criminal P. C. (1898), S. 345 — In compromise cases acquittal is recorded simply because parties come to terms — It does not mean that no offence was committed at all — Prosecution for offences under Ss. 323 and 147, Penal Code — Composition of offence under S. 323 — Held, offence under S. 147 is against public tranquillity and is of aggravated nature and hence it is taken out of orbit of Section 345, Criminal P. C. — The offences under Ss. 147 and 323 are different and composition of offence under S. 323 did not amount to acquittal of accused of offence under S. 147: 1964 (2) Cri LJ 111 (Pat), Dissent. Case law discussed.

(Paras 11, 12, 13 and 15)

Cases Referred: Chronological Paras
(1964) 1964-2 Cri LJ 111 (Pat),

Ramphal Gope v. State of Bihar

(1950) AIR 1950 Lah 121 (V 37) =
51 Cri LJ 1016, The Crown v.

Muhammad Hussain

(1948) AIR 1948 Pat 58 (V 35) =
48 Cri LJ 433, Gurunarayan Das
v. Emperor

(1941) AIR 1941 Sind 186 (V 28) =
43 Cri LJ 68, Agha Nazarali Sultan
Muhammad v. Emperor

(1925) AIR 1925 Lah 464 (V 12) =
26 Cri LJ 686, Emperor v.
Jarnali

(1923) AIR 1923 Mad 592 (V 10) =
ILR 46 Mad 257 = 24 Cri LJ
114, Venkanna v Crown

L Chandra and Navin Chandra, for Appellant, G A, for Respondents.

JUDGMENT: This is an appeal against the judgment and order passed by Sri M P Gautam, Magistrate 1st Class, Roorkee, district Sahranpur, acquitting the respondents of an offence under Sec. 323, I. P. C., and Section 147, I. P. C.

2. The facts, giving rise to this appeal, are as follows: Faiyaz, who is a resident of Sikandarpur, thana Fatehpur, district Sahranpur, lodged a report on 30-1-1965

at thana Fatehpur. The allegations in the report were that a nephew of Faiyaz was taking his bullocks to the field for ploughing. The bullocks damaged the crop of Aziz. The nephew of Faiyaz immediately drove out the bullocks, but he was slapped by Aziz and Idris. Faiyaz asked them not to slap his nephew. Thereupon all the respondents assaulted him with lathis. Faiyaz received a number of injuries. His injuries were medically examined. The Police registered a case against the respondents under Section 147, I. P. C. and Section 323, I. P. C. After completing the investigation, the police challaned the respondents. The parties filed a compromise for compounding the offence under Section 323, I. P. C. This compromise was verified and the trial Court passed the following order—

"The injured complainant Faiyaz has compounded the offence under Sec 323, I P. C. against the accused. The accused are thus acquitted under S 323, I P. C.

The charge-sheet under Section 147, I. P. C. has also been submitted. The learned counsel for the accused has relied upon the ruling cited in 1964-2 Cri LJ 111 (Pat). The charge under Sec. 147, I. P. C. also jolts when the offence has been compromised by the injured." Against this order, the State has come up in appeal to this Court.

3. It was argued by the learned Assistant Government Advocate that the offence under Section 147, I. P. C. was not compoundable and the trial Court was wrong in acquitting the respondents of the offence under Section 147, I. P. C.

4. In Ramphal Gope v. State of Bihar, 1964-2 Cri LJ 111 (Pat), cited by the trial Court, Syed Naqui Imam, J., has held as below:—

"Mr. Baidya Nath Prasad appearing for the petitioners has pointed out to me that before the trial Court there was a compromise petition filed, and the trial Court accepted the compromise so far as the offence under Section 323, Indian Penal Code was concerned. Now that the appellate Court has found these petitioners guilty under Sections 323 and 323/34, Indian Penal Code, in my opinion, the compromise petition can be put into effect even at this stage. There now remains the charge under Section 147, Indian Penal Code which is not compoundable. But it appears that the common object of the unlawful assembly was to assault. If the charges under Sections 323 and 323/34, Indian Penal Code fail on account of the compromise, it is obvious that the charge under Section 147, Indian Penal Code must also fail because the common object was to assault."

This question was the subject matter of decision in a number of cases. It appears that all the case law on the question was not placed before the Court in Ramphal

Gope's case, 1964-2 Cri LJ 111 (Pat)

5. In *The Crown v Muhammad Hussain*, 51 Cri LJ 1016 = (AIR 1950 Lah 121) Muhammad Jan and Kayani, JJ. reviewed the entire law on the subject, and held that if the offence under Sec 324, I P C was compounded by the permission of the Court, then the charge under S 148, I P C should not fail on that account and should be tried

6. The earliest case on this subject is *Venkanna v Crown*, AIR 1923 Mad 592. In this case, the accused were convicted under Sections 143 and 447, I. P. C. The offence under Section 447, I P C was compounded. It was argued that the common object of the accused was to commit an offence of trespass and, as the offence of trespass was compounded, therefore, the offence under Section 143, I P C, ipso facto, failed. This argument was not accepted, and Wallace, J observed as below —

"I am not prepared to support this contention. The essence of the offence under Section 143, Indian Penal Code, is the combination of several persons united in the purpose of committing a criminal offence and that purpose constitutes in itself an offence distinct from the Criminal offence which these persons agree and intend to commit. The compounding of one offence does not mean that the offence has not been committed, but that it has been committed, though the victim is willing either to forgive it or to accept some form of solatium as sufficient compensation for what he has suffered."

7. Another case is *Emperor v Jarnali*, AIR 1925 Lah 464. In this case, the accused were charged under Section 325, I P C and Section 147, I P C. The offence under Section 325, I. P. C was compounded with the permission of the Court. It was argued that after the acquittal of the accused of the offence under Sec 325, I P. C., the offence under Section 147, I P C ipso facto, fell down. Campbell, J observed as below —

"If he had referred to Section 403 (2), Criminal P C and had read with it Section 235 (1) and illustration (g) to that sub-section he would have perceived that an acquittal under Section 345, Criminal P C, of an offence under Section 325, Indian Penal Code, constitutes no bar to the subsequent trial of the accused on a charge under S 147, Indian Penal Code."

8. In *Gurunarayan Das v Emperor*, AIR 1948 Pat 58 the accused were charged under Sections 325, 147 and 148, I P C. This was a Division Bench case. Meredith, J observed as below —

"The convictions are not only for grievous hurt and hurt, but also under the rioting Sections 147 & 148. The offences under these Sections are not compoundable at all, and, therefore, no acquittal could be allowed by reason of the com-

promise in regard to the convictions under these sections"

Bennett, J. agreed with the judgment of Meredith J.

9. In *Agha Nazarali Sultan Muhammad v Emperor*, AIR 1941 Sind 186 which is a Division Bench case, the aforesaid Madras case was followed, and it was held that if the other offence was compounded it did not mean that the offence under Section 143, I P. C also fell down. In this connection, the following observations can be read with advantage —

"On the point that an offence under Section 143, Penal Code, is a distinct and separate offence in itself distinct and separate from an offence which it is the common object of the unlawful assembly to commit, and that although this latter offence may by itself be compounded, the offence under Section 143, Penal Code, is not compoundable as a matter of public Policy, being an offence in the fullest sense of the term against the public peace, there is the authority of the Madras High Court, ILR 46 Mad 257 = (AIR 1923 Mad 592) "

10. Unlawful assembly has been defined in Section 141, I P C. The first, second, fourth and fifth Clauses of this section would not apply to the facts of the present case. The third Clause, which would be applicable, reads as below:—

"To commit any mischief of criminal trespass or other offences, or"

It was argued that if an unlawful assembly was formed with an object to commit a crime and if it was found that the accused were not guilty of any offence, then the accused should not be held to have formed the unlawful assembly

11. Section 146, I P C defines rioting and Section 147, I P C, lays down the punishment for rioting by an unlawful assembly. The respondents formed an unlawful assembly and, in prosecution of the common object of the assembly, they committed violence and assaulted the complainant. The offence under Section 147, I P C is certainly separate from the offence under S 323, I. P C

12. The compromise would result in the acquittal of the respondents of the offence under Section 323, I P C. This would not go to show that they did not commit any violence as members of the unlawful assembly. In compromise case, the acquittal is recorded simply because the parties come to terms. It does not mean that no offence was committed at all. On the other hand, admitting that the offence had been committed, the parties patch up their differences and enter into compromise, so that they may live peacefully in future. It is for this end that composition of certain kind of offence is permitted

13. It should be noticed here that certain offences, which are of aggravated

nature, are excluded from the operation of Section 345, Criminal P. C., under which the offences are compounded. The offence under Section 147, I. P. C., is against the public tranquillity and is of an aggravated nature. It has, therefore, been taken out from the orbit of S. 345, Cr. P. C.

14. In my opinion, the acquittal of the respondents of the offence under Section 323, I. P. C., on the basis of the compromise would not go to show that the offence under Section 323, I. P. C., was not at all committed. It will, therefore, be not correct to say that the respondents did not commit violence in prosecution of the common object of the unlawful assembly. I have already observed in the earlier part of this judgment that in Ram-Phal Gope's case, 1964-2 Cri LJ 111 (Pat) the earlier decisions were not taken into consideration, and the judgment in that case was based on the finding that if the charges under Sections 323 and 323/34, Indian Penal Code, failed on account of the compromise, the charge under Section 147, Indian Penal Code, also failed because the common object was to assault. With due deference, I do not subscribe to this view.

15. After taking into consideration the rulings of different High Courts on this question, I am of the opinion that the composition of the offence under Section 323, I. P. C., did not amount to acquittal of the respondents of the offence under Section 147, I. P. C. The learned trial Court has, therefore, wrongly acquitted the respondents of the offence under Section 147, I. P. C.

ORDER

The appeal is allowed. The order of the trial Court acquitting the respondents of the charge under Section 147, I. P. C., is set aside. Let the record of the case be sent down to the trial Court for trying the respondents for the offence under Section 147, I. P. C. in accordance with law.

Appeal allowed

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(V 57 C 14)

KONDAIAH, J.

Nimmakayala Audi Narrayanamma, Appellant v. State of Andhra Pradesh, Respondent.

Criminal Appeal No. 137 of 1968, D/-24-4-1969, against the complaint by the Asst. S. J., Cuddapah, D/-19-1-1968.

(A) Criminal P. C. (1898), Ss. 476, 537 — Scope and principles of Section 476 stated — It is incumbent on Court before making complaint to record finding that it is expedient in interests of justice to enquire into offence — Omission to record finding is not

mere irregularity curable under Sec. 537 but goes to root of matter — Where no such finding is recorded, it is not permissible to draw presumption under Sec. 114, Evidence Act that Court had formed opinion regarding expediency to enquire into matter, even if Court making complaint may be Court before which offence was committed — Satisfaction is objective — Order must be a speaking order — Person sought, to be proceeded against must be heard before forming an opinion — AIR 1962 All 251, Dissent. (Evidence Act (1872), S. 114.)

On an analysis of Section 476 Criminal P. C. the following principles can be deduced :

(1) It is not every case of perjury irrespective of facts and circumstances that should form the subject of an enquiry but it is only in such cases where the Courts are of honest belief and opinion, on an objective consideration of the facts and circumstances that the interests of justice require the laying of a complaint.

(2) It is not mandatory but discretionary for the Court, depending upon the facts and circumstances of each case, either to conduct any preliminary enquiry or to dispense with the same, to form an opinion that it is in the interests of justice to prosecute the person or persons that committed perjury.

(3) The proceeding under Section 476 appealable under Sec. 476-B is an independent and altogether a different proceeding from that of the original Sessions case where the witnesses have committed the offence of perjury.

(4) The proceeding under Section 476 being penal in nature, it is not only desirable and reasonable, but just and proper and in accordance with the principles of natural justice to afford a reasonable opportunity by issuing a show cause notice to the accused party to establish by adducing evidence oral and documentary that it was not expedient in the interests of justice to prosecute him.

(5) On a plain reading of the provisions of Section 476, and in particular the words "such Court may...record a finding to that effect", there is no room for doubt that the Court should record a finding that it is expedient in the interests of justice that an enquiry should be made, as a condition precedent for filing a complaint.

(6) The provision in Section 476 relating to the recording of a finding is not merely directory but is mandatory, for, an appeal lies against the order of the Court, and under Section 476-B, the appellate Court is competent either to withdraw the complaint already made or direct the complaint to be made, depending on the facts and circumstances of each case.

(7) The opinion or the satisfaction contemplated under Section 476 is an objective and not a subjective one and should be reflected in the finding recorded or the order passed by the Court and such an order must be a speaking one supported by valid and justifiable grounds to enable the appellate Court

under Section 476-B to know the material on which the Court had come to such a conclusion or opinion that it was expedient in the interests of justice to launch a prosecution

(8) Though the Court, while recording the finding contemplated under Section 476 need not strictly adhere to the very language, viz., "that it is expedient in the interests of justice that an enquiry should be made," used in the section, it must use such language that it leaves no doubt that it was a fit and proper case and it was in the interests of justice to launch a prosecution against the person or persons that committed perjury.

(9) Even where the Presiding Officer, before whom the offence under Section 195 (1) (b) or (c) has been committed, himself prefers the complaint and forwards the same to the Magistrate, no presumption under Section 114 of the Evidence Act to the effect that he had formed an honest opinion, even though no such finding has been recorded, that it is expedient in the interests of justice to enquire into the offence, can be made as, on a plain and grammatical reading of the language and scheme of Section 476, it is incumbent on the Court to give a specific finding before making a complaint. AIR 1962 All 251, Dissent.

(10) The omission or failure to record a finding to the effect that it is expedient in the interests of justice to enquire into the offence, is not a mere irregularity curable under Section 537 Criminal P. C. and it goes to the root of the matter as the Court will have no jurisdiction to file a complaint without recording such a finding. AIR 1962 All 251, Dissent. (Para 16)

(B) Civil P. C. (1908), Preamble — Precedents — Decisions of Madras High Court prior to June 1954, are binding on Andhra Pradesh High Court. AIR 1955 Andhra 87, Foll. (Para 15)

Cases	Referred:	Chronological	Paras
(1968) AIR 1968 All 296 (V 55) = 1968 Cri LJ 1218 (FB), Chhajoo v. Radhay Shyam			9
(1968) AIR 1968 Ori 144 (V 55) = 1968 Cri LJ 1092, Paramananda Mohapatra v The State			12
(1965) 1965 (2) Cri LJ 837 = 1965 BLJR 81, Rajeswar Singh v. Ram Bahadur Singh			14
(1963) 1963-1 Cri LJ 713 = ILR (1962) 12 Raj 526, Brymohanlal v. Sohanraj			12
(1962) AIR 1962 All 251 (V 49) = 1962 (1) Cri LJ 555, Lal Behari v. The State			8, 15
(1959) AIR 1959 Mys 117 (V 46) = 1959 Cri LJ 618, Narajappa v. Chik-karamiah			14
(1958) 1958-2 Andh WR 480 = 1958 Andh LT 863, Sundararami Reddi v Venkatasubba Naidu			13, 14
(1955) AIR 1955 Andhra 87 (V 42) = ILR (1955) Andh 1 = 1955 Cri LJ 770, Subbarayudu v. State of Andhra			15

(1952) AIR 1952 Pat 70 (V 39) = 1952 Cri LJ 285, Kailash Pati Mishra v. Nandlal Ahir	11
(1948) AIR 1948 Mad 297 (V 35) = 49 Cri LJ 340, In re, Pakhirsawami Pillai	10, 15
(1946) AIR 1946 All 156 (V 33) = 47 Cri LJ 545, Liaqat Husan v. Vinay Prakash	9
(1933) AIR 1933 Mad 67 (1) (V 20) = 33 Cri LJ 960, Ramayya v. Emperor	10, 15
(1928) AIR 1928 Mad 783 (V 15) = 29 Cri LJ 732, Chaduvula Munu-swami Naidu v. Emperor	10, 15
C. Padmanabha Reddy, for Appellant; Public Prosecutor, for the State.	

JUDGMENT: The complaint filed on February 2, 1965 by the appellant before the Police against Gotur Palreddi and eight others for the offences under Sections 457, 380, 395 and 395 read with 397 I. P. C. was referred as false. Thereupon, a private complaint preferred by her on 1-7-65 before the J.S.C.M., Cuddapah was, after committal tried by the Assistant Sessions Judge, Cuddapah in S. C. 5/65 who, by his judgment dated October 28, 1967 acquitted the accused of all the charges levelled against them holding that there was neither truth nor substance in the complaint. On 19-1-1968, the Assistant Sessions Judge filed a complaint before the Judicial First Class Magistrate, Cuddapah against the appellant alleging that she had maliciously instituted criminal proceedings against Gotur Palreddi and eight others on the false charge of commission of the offence of dacoity with intent to cause injury to them, knowing that there was no just or lawful ground for such charge or proceeding in his Court, and has thereby committed an offence punishable under the 2nd part of Section 211 I. P. C. Hence this appeal.

2. The failure on the part of the Assistant Sessions Judge, contended by Sri Padmanabha Reddy for the Appellant, to give a finding as contemplated by Section 476 Criminal P. C. about the expediency in the interests of justice to inquire into the offence under Section 211 I. P. C. alleged to have been committed by his client in the course of trial in S. C. No. 5 of 1965, warrants the quashing of the complaint.

3. The learned Public Prosecutor contended contra and urged that Section 476 Criminal P. C. does not contemplate the Court to give any such specific finding in every case.

4. The point that arises for determination is whether on the facts and in the circumstances, the Assistant Sessions Judge has or has not preferred the complaint according to law as contemplated by the provisions of Section 476 Criminal P. C.?

5. For a proper appreciation of the point at issue, it is profitable to consider Sec. 476 Criminal P. C. which reads thus:

"When any Criminal Court is...of opinion that it is expedient in the interests

of justice that an enquiry should be made into any offence referred to in Section 195 sub-section (1), clause (a) or clause (b) which appears to have been committed in or relation to a proceeding in that Court, such Court may after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate, of the First Class having jurisdiction. . . .

Section 476 Criminal P. C. prescribes an exhaustive procedure relating to the preferring of complaints by Courts, civil, criminal or revenue, in respect of offences mentioned in clauses (b) and (c) of sub-sec (1) to Section 195. This section enjoins the Court, before which the offence under Section 211, I. P. C. appears to have been committed in or in relation to any proceeding before it, to be satisfied objectively in each case that it was expedient in the interests of justice that an enquiry should be held into the offence. Thereafter the Court may have such preliminary enquiry as it thinks necessary and record a finding to the effect that it is expedient in the interests of justice or that it is a fit case to prosecute the person or persons who committed the offence and then make a complaint in writing and forward the same to the First Class Magistrate for disposal according to law. The words "such Court may after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect" must necessarily be construed that it is incumbent on the Court to record a finding to the effect that it is expedient in the interests of justice to enquire into the offence referred to in Section 195 (1) clause (b) or (c) although the preliminary enquiry may or may not be held in the discretion of the Court, depending upon the circumstances of each case. The action of the Court under Section 476 is appealable by the aggrieved party under Section 476-B Criminal P. C. to the Court having jurisdiction to receive appeals against the decisions of that Court.

In my considered opinion, the opinion contemplated under Section 476 to be formed by the Court before which the offence appears to have been committed, that it was expedient in the interests of justice to prosecute such person or persons, must be an objective but not a subjective one. The test that has to be laid must be that of a prudent reasonable person and it should be a speaking one supported by valid grounds. Otherwise it would be often very difficult and sometimes even impossible for the appellate Court under Section 476-B to arrive at a conclusion as to whether the Court has rightly applied its mind and passed the order under Section 476 Criminal P. C. or not. The opinion contemplated under Section 476 must be expressed in a speaking order. Whether it be either with or without such preliminary enquiry as the Court thinks it necessary it has to record a finding to the effect

that on a consideration of the facts and circumstances, it was of an honest and bona fide opinion that it was a fit case for prosecution or that it was expedient in the interests of justice to enquire into the matter. Without such finding it would be very difficult to probe into the mind of the Court that passed the order under Section 476 Criminal P. C. or the complaint lodged by the Court before the First Class Magistrate as the appellate Court while considering under Sec. 476-B Criminal P. C. is entitled to agree or disagree with such an action of the trial Court and make the complaint in cases where the subordinate Court refused to make a complaint, under Section 476-B or direct the withdrawal of the complaint in appropriate cases if it finds that the same is not warranted in the interests of justice.

6. That apart, the provisions of Section 476 and Section 476-B Criminal P. C. contemplate a different proceeding from that of the original proceeding before the subordinate Court where the offence appears to have been committed by the party. After the closure of the enquiry relating to the main offence which was decided in the Sessions Case, the further proceeding contemplated under Section 476 Criminal P. C. to prosecute the person who had filed a false complaint, which in the opinion of the Court it is expedient in the interests of justice to be enquired into is a different proceeding. No doubt it is true, as pointed out by the learned Public Prosecutor, in some cases it happens that the very same Magistrate or the Judge who tried the original case would have been the Presiding Officer who had to consider the applicability of the provisions of Section 476 Criminal P. C. and file a complaint in appropriate cases. Even then it is just and proper that that Court whether presided by the same presiding Officer or by a different Officer, should proceed according to the provisions of Section 476 and issue a show cause notice as to why the person sought to be prosecuted should not be prosecuted and after affording an opportunity, record a finding to the effect that it was expedient in the interests of justice to enquire into the offence committed by him and file a complaint before the First Class Magistrate.

The proceedings under Section 476 Criminal P. C. being judicial and criminal in nature, the interpretation that should be placed in construing the section should be just, fair, proper and equitable and must be in accordance with the principles of natural justice. By adopting such interpretation and procedure, the aggrieved party would be afforded with an adequate opportunity to show and satisfy the Court that it was not in the interests of justice, to launch the prosecution and thereby avoid further proceeding. That apart, the appellate Court also would be in a position to appreciate the reasons assigned in each case and would have the advantage of coming to its own

conclusion without any difficulty about the justification or otherwise of launching the prosecution in a particular case. When once the prosecution had been launched, the accused will not be having an opportunity thereafter to raise the question of expediency in the interests of justice to launch the very prosecution itself. The case thereafter will have to be gone into on the merits.

7. It appears there is no direct case of our High Court on this question. I shall presently consider the several decisions of various High Courts cited before me by both the counsel in support of their respective contentions.

8. The decision of the Allahabad High Court in *Lal Behari v. State*, AIR 1962 All 251, on which strong reliance has been placed by the learned Public Prosecutor, in a way supports his plea. The learned Public Prosecutor relies upon the following passage of Nigam J., who spoke for the Bench, at page 255:

"... the jurisdiction of the Court to prefer a complaint does not in my opinion depend upon the recording of the opinion though it is consequent on the formation of such an opinion. In the circumstances, I am of the view that omission to record such an opinion is only an irregularity and does not affect the legality of the complaint. Normally the fact that a complaint is preferred is itself evidence of the fact that such an opinion had been formed and in proper cases a presumption may even be raised under Section 114 of the Indian Evidence Act."

No doubt, the aforesaid passage supports the contention of the learned Public Prosecutor. It is pertinent to notice two sentences prior to the aforesaid passage, which read thus:

"... I am of opinion that the formation of an opinion that the prosecution is expedient in the interests of justice is a condition precedent to the preference of the complaint. The law also requires that such a finding should be recorded..."

The aforesaid passage in paragraph 20 in the Judgment of Nigam J., at page 255, if read as a whole, would also support the plea of the appellant herein that a finding to the effect that the prosecution is expedient in the interests of justice should be recorded.

9. In *Liaquat Husam v. Vinay Prakash*, AIR 1946 All 156, a Division Bench of the same High Court has ruled that a finding by the Court that the prosecution is expedient in the interests of justice must be given before the complaint. In *Chhajoo v. (1959) AIR 1968 All 296 (FB)*, a 1959 Cri Lj, the same High Court, while examining the scope and interpretation of (1958) 1958-2 Annual P. C., observed at Andh LT 863, S.

v. Venkatasubba Naion 476 of the Code (1955) AIR 1955 Andhras already pointed ILR (1955) Andh 1 contemplates three LJ 770, Subbarayudu v. complaint: The Andhra to be given

by the Court concerned to the effect that it is expedient in the interests of justice to file a complaint, the second is the making of the complaint in writing signed by the presiding officer or by the officer appointed by the High Court and the third stage is that of forwarding the same to a Magistrate of the First Class."

10. The Madras High Court is consistently of the view that the provision in Section 476 Criminal P. C. to record a finding that it is expedient in the interests of justice to enquire into the offence, is not merely directory but is mandatory and it is a condition precedent for preferring a complaint before the Magistrate in *Chaduvula Munuswami Naidu v. Emperor*, AIR 1928 Mad 783, *Devadoss*, J ruled thus at page 783

"Before a complaint under Section 476 is made, it is necessary that a Court which thinks that an offence mentioned in Sec. 195, sub-section (1), clause (b) or clause (c) has been committed should record a finding to that effect and after recording such finding may make a complaint. The provision is not merely directory, but it is mandatory, for an appeal lies against the order of the Court and under Section 476-B an appellate Court can either withdraw a complaint or direct a complaint to be made. That being so, it is necessary for the appellate Court to see what reasons the lower Court had for deciding to make a complaint under Section 476. It is not every case of perjury that should form the subject of an inquiry, but it is only when the interests of justice do require that a complaint should be made then and then only a complaint should be made. Though the Courts should be anxious to put down perjury as much as possible, it is not in the interests of justice that every false statement made by a witness in Court or in an affidavit filed in Court should be subject of a charge for perjury."

In *Ramayya v. Emperor*, AIR 1933 Mad 67 (1), a Division Bench of the Madras High Court ruled thus:

"The Code lays down so as to leave no room for any doubt that the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made and therefore Courts will be well advised always to make a record to that effect if that is their opinion because most regrettable delays and waste of time sometimes arise by putting the superior Courts to the task of discovering whether they mean something which they have not written."

In re, *Pakhriswami Pillai*, AIR 1948 Mad 297, *Yahya Ali*, J, ordered the withdrawal of the complaint as there was no finding by the Magistrate that the prosecution was expedient in the interests of justice as the same is an incurable defect.

11. In *Kailashpati Mishra v. Nand Lal Ahir*, AIR 1952 Pat 70, *Ahmed*, J., while considering the scope of Section 476 Criminal P. C. at page 71, observed thus:

"The section, therefore, lays down two conditions for its operation. Firstly, a preliminary inquiry, if necessary, shall be held and secondly, that the Court shall record a finding to the effect stated in the section."

12. In *Paramananda Mohapatra v. The State*, AIR 1968 Orissa 144, the Orissa High Court has taken the same view. In *Brijmohanlal v. Sohanraj*, 1963 (1) Cri LJ 713 (Raj), the Rajasthan High Court held that the requirement of recording a finding that it is expedient in the interests of justice that a complaint be filed under Section 476, is mandatory and any failure to comply with that requirement deserves the order to be set aside.

13. The decision of Jaganmohan Reddy, J. (as he then was) in *Sundarami Reddy v. Venkatasubba Naidu*, 1958-2 Andh WR 480, does not render any assistance to the prosecution case in the present case. What the learned Judge had to consider in that case was whether or not preliminary enquiry was compulsory in each case. The learned Judge, at page 485, observed thus:

"What the Court has, therefore, to decide under this section is whether an offence of the kind contemplated under the section appears to have been committed and in the interests of justice it should further enquire into it. It is not always obligatory on the part of the Court to make a preliminary enquiry, but that would depend upon the facts and circumstances of each case."

Negating the contention of the counsel for the accused that the Sessions Judge failed to record his opinion that it was expedient in the interests of justice that an enquiry should be made, the learned Judge observed at page 484 thus:

"No doubt the Sessions Judge had not used the actual words of the section, namely that it is expedient in the interests of justice that an enquiry should be made, but in my view there is no charm in this incantation where the Judge has used language which leaves no doubt that the prosecution was in the interests of justice. It is not a question of a mere inference alone."

14. The decisions of the Mysore High Court in *Narajappa v. Chikkaramiah*, AIR 1959 Mys 117 and of the Patna High Court in *Rajeswar Singh v. Ram Bahadur Singh*, 1965 (2) Cri LJ 837 (Pat), relied upon by the learned Public Prosecutor, do not advance his plea, as those cases are the authorities for the view expressed by this Court in 1958-2 Andh WR 480, that the preliminary enquiry was not compulsory, but the Court, in its discretion, may dispense with the holding of an enquiry if it thinks that it was unnecessary on a consideration of the facts and circumstances of any given case.

15. The decisions of the Madras High Court in AIR 1928 Mad 783, AIR 1933 Mad 67 (1) and AIR 1948 Mad 297, being before June, 1954, are binding on me (see *Subbarayudu v. State of Andhra*, ILR 1955 Andhra 1 = (AIR 1955 Andhra 87)). That apart, the language of Section 476

Criminal P. C. fully supports the view of the Madras High Court that it is incumbent on the Court to form an opinion that it is expedient in the interests of justice to enquire into the offence and record a finding to that effect, and that the failure to conform with such a requirement warrants the quashing of the complaint as the defect is not a one which can be cured under Section 537 Criminal P. C. I am in entire agreement with the view expressed by the Madras High Court. I am unable to agree with the view expressed by Nigam, J., who spoke for a Division Bench of the Allahabad High Court in AIR 1962 All 251, that the jurisdiction of the Court to prefer a complaint does not depend upon the recording of the opinion and that the omission to record such an opinion is only an irregularity and does not affect the legality of the complaint.

16. From the aforesaid discussion, the following principles can safely be deduced:

(1) It is not every case of perjury irrespective of facts and circumstances that should form the subject of an enquiry but it is only in such cases where the Courts are of honest belief and opinion, on an objective consideration of the facts and circumstances that the interests of justice require the laying of a complaint.

(2) It is not mandatory but discretionary for the Court, depending upon the facts and circumstances of each case, either to conduct any preliminary enquiry or to dispense with the same, to form an opinion that it is in the interests of justice to prosecute the person or persons that committed perjury.

(3) The proceedings under Section 476 Criminal P. C. appealable under Sec. 476-B is an independent and altogether a different proceeding from that of the original Sessions case where the witnesses have committed the offence of perjury.

(4) The proceeding under Section 476 Criminal P. C. being penal in nature, it is not only desirable and reasonable, but just and proper and in accordance with the principles of natural justice to afford a reasonable opportunity by issuing a show cause notice to the accused party to establish by adducing evidence oral and documentary that it was not expedient in the interests of justice to prosecute him.

(5) On a plain reading of the provisions of Section 476, and in particular the words "such Court may record a finding to that effect," there is no room for doubt that the Court should record a finding that it is expedient in the interests of justice that an enquiry should be made, as a condition precedent for filing a complaint.

(6) The provision in Section 476 relating to the recording of a finding is not merely directory but is mandatory, for, an appeal lies against the order of the Court; and under Section 476-B, that the appellate Court is competent either to withdraw the complaint already made or direct the complaint to be made, depending on the facts and circumstances of each case.

(7) The opinion or the satisfaction contemplated under Section 476 is an objective and not a subjective one and should be reflected in the finding recorded or the order passed by the Court and such an order must be a speaking one supported by valid and justifiable grounds to enable the appellate Court under Section 476-B to know the material on which the Court had come to such a conclusion or opinion that it was expedient in the interests of justice to launch a prosecution

(8) Though the Court, while recording the finding contemplated under Section 476 Criminal P. C., need not strictly adhere to the very language, viz., "that it is expedient in the interests of justice that an enquiry should be made," used in the section, it must use such language that it leaves no doubt that it was a fit and proper case and it was in the interests of justice to launch a prosecution against the person or persons that committed perjury

(9) Even where the Presiding Officer, before whom the offence under Section 195 (1) (b) or (c) has been committed, himself prefers the complaint and forwards the same to the Magistrate, no presumption under Section 114 of the Evidence Act to the effect that he had formed an honest opinion, even though no such finding has been recorded, that it is expedient in the interests of justice to enquire into the offence, can be made as, on a plain and grammatical reading of the language and scheme of Section 476, it is incumbent on the Court to give a specific finding before making a complaint.

(10) The omission or failure to record a finding to the effect that it is expedient in the interests of justice to enquire into the offence, is not a mere irregularity curable under Section 537 Criminal P. C. and it goes to the root of the matter as the Court will have no jurisdiction to file a complaint without recording such a finding.

17. Let me now turn to the facts of the present case and under the merit of the respective contentions of the counsel, applying the principle referred to above. Admittedly, the Assistant Sessions Judge, who tried S. C. No. 5 of 1965, did not record a finding in the Sessions case that the appellant herein had committed perjury and it was in the interests of justice to prosecute her. Not only that there was no finding to that effect in the Sessions case which ended in acquittal, but even a show cause notice as to why the appellant who committed perjury should not be proceeded against, was not issued before preferring the complaint before the Magistrate. It is true, as contended by the learned Public Prosecutor, that it was the same person who tried the Sessions case that filed the complaint before the Magistrate, but on that account alone, it cannot be held that he had formed in his mind an honest and bona fide opinion that it was just and proper to prosecute the appellant. As already expressed earlier, I feel it not just and pro-

per to draw any inference or presumption under Section 114 of the Evidence Act that the Assistant Sessions Judge who tried the case being the same person that filed the complaint before the Magistrate, must be presumed to have come to such an honest conclusion that it was in the interests of justice to conduct an enquiry into the offence of perjury committed by the appellant before him. When there is no finding either in the original judgment or subsequently, it is very difficult to sustain the argument of the learned Public Prosecutor that the complaint in the present case is in order. Therefore, for all the reasons stated above, the proceedings in P. R. C. 1/68 on the file of the Judicial First Class Magistrate, Cuddapah that have arisen out of the complaint filed in the present case, must be held to be not according to law and procedure contemplated under Section 476 Criminal P. C. and must be quashed. It is no doubt open to the Court to proceed afresh and make any complaint, if it so thinks, after following the procedure indicated above.

18. In the result, the appeal is allowed, quashing the complaint filed on 19-1-1968 by the Assistant Sessions Judge, Cuddapah before the Judicial First Class Magistrate, Cuddapah.

Appeal allowed.

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AIR 1970 ASSAM & NAGALAND 43
(V 57 C 9)

S K DUTTA, C J.
AND K C SEN, J

Lt Col G K Apte and others, Petitioners v Union of India and others, Respondents

Criminal Revn Nos 63, 87, 112 and 143 of 1968, D/- 22-5-1969, against order of Spl J, Gauhati, D/- 29-4-1968.

(A) Criminal Law Amendment Act (1966), S. 5 (1) (a) — Accused charged and tried with person not amenable to military, naval or air force law — Charge-sheet submitted and trial commenced long before 30-6-66 — Proceedings can be continued by Special Judge even if charges had been framed after 30-6-66 — Word 'charged' in section means only the submission of a charge sheet before that date and not the framing of a charge by the court. (Para 4)

(B) Criminal Law Amendment Act (1966), S. 5 (1) (a) — Applicability — Accused appearing in court before 30-6-66 in obedience to summons — Section applies to the case even though some of the documents referred to in S. 173, Criminal P. C. were not given to accused even long after 30-6-66 — In view of the fact that 'trial' under S. 251-A (1), Criminal

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P. C. begins as soon as the accused appears or is brought before court trial in the case must be taken to have commenced long before 30-6-66 when the accused appeared in court — Criminal P. C. (1898) S. 251-A (1). (Para 5)

(C) Criminal P. C. (1898), Ss. 196-A (2), 4 (n) and 221 — Prosecution for conspiracy to commit offence under S. 5 (2), Prevention of Corruption Act and also for offence under that section — Sanction not obtained in respect of conspiracy — Prosecution must fail in respect of both offences — Prevention of Corruption Act (1947), S. 5 (2).

Where the accused is charged for two offences, namely (1) conspiracy to commit an offence under S. 5 (2), Prevention of Corruption Act and (2) the offence under that section committed in pursuance of that conspiracy both the charges must fail if there is no sanction under S. 196-A (2) in respect of the offence of conspiracy which is a non-cognizable one (Para 17)

A man who commits an offence under sections 161 or 165 or 165A of the Indian Penal Code can be punished either under section 5 (2) of the Prevention of Corruption Act or under the said sections of the Indian Penal Code. If the offence is investigated under section 156, Criminal Procedure Code as a cognizable offence, the court can punish only under those sections of the Penal Code and the prescribed punishment is imprisonment of either description for a term which may extend to three years or with fine or with both. But if the offence under those sections is to be punished under section 5 (2) of the Prevention of Corruption Act, the investigation must be under the Act and in that case no police officer below the rank of a Deputy Superintendent of Police can investigate it without the order of a Presidency Magistrate or Magistrate of the first class, as the case may be. An offence punishable under section 5 (2) of the Act is non-cognizable as section 156, Criminal Procedure Code which authorises an officer in charge of a Police Station to investigate a cognizable offence without the order of a magistrate, will not apply to investigation of an offence made under the Act

(Paras 14, 15)

The offence of 'misconduct' as defined in section 5 of the Act has a very wide meaning. It includes the offences under sections 161, 165, and 165A, Indian Penal Code and some more offences. The Prevention of Corruption Act creates two new rules of evidence, one under S. 4 and the other under section 5 (3), of an exceptional nature and contrary to the accepted canons of criminal jurisprudence. These sections introduce an exception to the general rule as to the burden of proof in criminal cases and shift the onus on

to the accused. Section 5 (2) prescribes a very severe punishment. In view of all these, the investigation into an offence of misconduct which is punishable under section 5 (2) has been left to police officers of high rank and consequently such an offence is non-cognizable. AIR 1955 SC 196, Rel. on. (Para 16)

No question of remitting the case for reframing of charges can arise in the case as the charge of conspiracy refers to a non-cognizable offence only and not to cognizable as well as non-cognizable offence. Such a charge cannot exist in the eye of law as the court could take no cognizance of such a conspiracy without sanction under section 196A (2) of the Criminal Procedure Code. Hence the charges must be quashed. AIR 1961 SC 1241, Distinguished. (Para 18)

Cases Referred: Chronological Paras (1961) AIR 1961 SC 1241 (V 48)=

1961 (2) Cri LJ 302, State of A. P.

v. Kandimalla Subbiah 18

(1955) AIR 1955 SC 196 (V 42) =

1955 Cri LJ 526, H. N. Rishbud

v. State of Delhi 10, 11, 14, 16

N. C. Malkani, S. K. Sen, A. R. Banerjee (In No 63), P. Chaudhuri, B. K. Goswami, M. S. Pathak (In No 87), D. Pathak, P. P. (in No. 112) and J. Choudhuri. P. C. Katak (in No. 143), for Petitioners, B. C. Barua, Advocate General, A. Singh P. P., D. Pathak, P. P. (in Nos 63, 87 and 143), G. Bhattacharjee, B. K. Goswami, P. C. Deka, B. C. Barua (in No 112), for Opposite Parties

DUTTA, C. J.: This is a revision petition. The petitioner's case is that he had been serving in the Indian Army as a Commissioned Officer for 23 years and pensioned off since 1st December, 1967. In the year 1960 the Central Government decided to construct roads on the northern corners of India with one of the headquarters at Tezpur under the command of Brigadier O. M. Mani, Chief Engineer and with such headquarters at Dibrugarh, Along and other places in North East Frontier Agency under Engineer Commanders. The petitioner was one of such Engineer Commanders and posted at Dibrugarh from November 1960 to 2nd April 1962 under the said Chief Engineer, as a Division Commander, local purchases of stores required for the construction of roads, bashes, bridges and culverts, materials like bricks, broken bricks, bamboos thatch, timbers and sand etc. These materials had to be removed from Dibrugarh to Lekhabali, Sonarighat, Deo right and other places beyond the river Brahmaputra and to be air-lifted to Along and other places in North East Frontier Agency from Mohanbari. The petitioner was authorised to direct local purchases of the said materials up to the extent of Rs 10,000/- per each supply order to be

issued by the petitioner under his signature only and he was also authorised to enter into a contract to the extent of Rs 5,00,000/- The construction of the roads was treated as an emergency work and hence acceptance of the supply quotations and purchases on negotiations from suppliers were permitted and quotations from the suppliers were not insisted upon.

On the 5th July, 1963 that is more than one year after the petitioner was transferred to Roorkee as Commander of the G. R. E. F. Centre, the Superintendent of Police of the Special Police Establishment, C. I. A., New Delhi filed a first information report alleging that the petitioner and one Israil Khan had by manipulation of quotations caused supply orders to be issued in the name of Israil Khan and Sons in which they were interested, giving exorbitant rates. It was alleged that the petitioner abused his position as a public servant in the matter of purchase of materials and also in carriage of stores by boats across the Brahmaputra and thereby committed misconduct in the discharge of his duties. On these allegations a Special Judge by order dated the 29th April, 1968, framed charges against the petitioner and this revision petition has been filed for quashing the same.

2. It is necessary to mention certain dates to show how the case progressed during the course of nearly six years. The first information report was submitted on 5-7-63, and the accused was put under suspension in October of that year. The statements of witnesses were recorded from the 10th July up to the 13th October, 1964. Sanction for prosecution under Section 6 of the Prevention of Corruption Act 1947 (hereinafter called the Act) was granted by the Government on 3-9-64 and on 21-10-64 chargesheet was filed in Court. The accused was summoned to appear in Court in June, 1965 and some documents under Section 173, Criminal Procedure Code were filed on the 18th November, 1966. As the accused was not given copies of the said documents, in April 1967, he filed an application for supply of relevant documents and the Court passed an order on 15-5-67 for the supply of such documents to the accused.

The prosecution moved this Court against the order of the Judge dated 15-5-67 and this Court dismissed the petition on 12-9-67. The accused also moved this Court for quashing the proceedings and this Court dismissed the petition on 12-4-68. The charges were framed on 29-4-68 and against this order framing the charges, this Court was moved on 1-5-68 by a petition which is before us now. The accused has first been charged of conspiracy to commit an offence punishable under Section 5 (2) of the Act. Second-

ly he has been charged for committing that offence in pursuance of the conspiracy.

3. The first point raised by Mr Malankani is that under Section 549 of the Criminal Procedure Code the Central Government may make rules as to the cases in which persons subject to military, naval or air force law shall be tried by a Court to which the Code applies or by court-martial. The Central Government framed rules under the said section called the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952. It is not necessary to quote all the rules. It will suffice to say that under rule 3 of the said rules, when a person subject to military, naval or air force law, is brought before a Magistrate on accusation of an offence for which he is liable to be tried by court martial the Magistrate is not to proceed with the case unless he is moved to do so by the relevant military authority. He can, however, proceed with the case when he is of the opinion, for reasons to be recorded, that he should so proceed without being moved in that behalf by a competent authority.

Even in such a case, the Magistrate has to give notice of his opinion to the Commanding Officer and he is not to pass any order of conviction or acquittal or frame charge or commit the accused until the expiry of seven days from the service of the notice. The Commanding Officer can inform the Magistrate that in his opinion the accused should be tried by court-martial. Subsequent rules prescribe the steps to be taken thereafter. It is an admitted fact that in the instant case, these rules were not followed.

It is conceded that section 549, Criminal Procedure Code did not formerly apply to proceedings before a Special Judge. However, by the Criminal Law Amendment Act of 1966 (hereinafter called the Act of 1966), it is declared that for the purposes of the Criminal Law Amendment Act of 1952, by which the appointment of Special Judges is provided, the Court of a Special Judge shall be deemed to be a Court of ordinary criminal justice. Then sub-section (1) of Section 5 of the Act of 1966 reads as follows:

"5. (1) Notwithstanding anything contained in this Act or in the principal Act as amended by this Act,—

(a) cases pending immediately before the 30th day of June, 1966, before a special Judge in which one or more persons subject to military, naval or air force law is or are charged with and tried for an offence under the principal Act together with any other person or persons not so subject, and

(b) cases pending immediately before the said date before a special Judge in which one or more persons subject to military, naval or air force law is or are

alone charged with and tried for an offence under the principal Act and charges have already been framed against such person or persons, shall be tried and disposed of by the special Judge."

4. In the case before us the charge-sheet was submitted on 21-10-64 and the charge was framed on 29-4-68. The petitioner is charged and being tried together with a person who is not subject to military, naval or air force law. The learned Advocate-General therefore submits that as the accused was charge-sheeted and his trial commenced before 30-6-66, clause (a) of the above section 5 (1) applies in this case and the proceedings can be continued before the Special Judge. Mr. Malkani's first contention is that the word "charged" means framing of charge and therefore the above provision does not save the present proceedings as admittedly the charge was framed after the 30th June, 1966. There is no force in this argument. The word "charged" can only mean the submission of the charge-sheet.

It is obvious from sub-section (2) that where the accused is subject to military, naval or air force law, and is alone charged and tried for an offence and charges have already been framed against such person before 30-6-66, the case shall be disposed of by the special Judge. This shows that a distinction is made between "charged" and "framing of charge."

5. Mr. Malkani next argues that "trial" begins only after the magistrate satisfies himself under Section 251-A (1) that all the documents referred to in Section 173, Criminal Procedure Code have been furnished to the accused. He points out that even long after the 30th June, 1966, some of the documents were not so furnished and the magistrate had to order the prosecution to furnish the same. Therefore, he contends that the trial did not begin before the 30th June, 1966. There is no force in this argument either. The word "trial" was defined in the Criminal Procedure Code of 1872 to mean proceedings after the framing of charge. This definition was dropped and now there is no fixed or universal meaning of the said word. It must be construed according to the particular context and intentment of each individual section. Under Section 251-A (1), the documents are to be given at the commencement of the trial when the accused appears or is brought before a magistrate. Therefore, obviously the trial under the section begins as soon as the accused appears or is brought before a magistrate. In this view of the matter the trial of the accused in the present case began long before the 30th June, 1966 and clause (a) of Section 5 (1) of the Act of 1966 applies to it.

6. The second contention of Mr. Malkani is that under Section 196A (2) of the Criminal Procedure Code, sanction of the State Government or a Chief Presidency Magistrate or District Magistrate specially empowered is necessary for a Court to take cognizance of an offence of conspiracy where the object of the conspiracy is to commit any non-cognizable offence. In the present case charges have been framed on the allegation that the accused entered into a conspiracy to commit an offence under Ss. 5 (2)/5 (1) (d) of the Prevention of Corruption Act (hereinafter called the Act). A second charge has been framed on the allegation that the accused in pursuance of the said conspiracy committed offences under the said sections.

7. It is pointed out that Section 5A of the Act lays down that notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank (a) in the Presidency towns of Madras and Calcutta, of an Assistant Commissioner of Police (b) in the Presidency town of Bombay, of a Superintendent of Police, and (c) elsewhere, of a Deputy Superintendent of Police shall investigate any offence punishable under S. 161, Section 165, or Section 165-A of the Indian Penal Code or under sub-section (2) of Section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be, or make any arrest therefore without a warrant.

8. In Section 4 (n) of the Criminal Procedure Code, non-cognizable offence is defined as an offence for which a Police officer may not arrest without a warrant. It is submitted that an offence under Section 5 of the Act is non-cognizable as a police officer, which means any police officer, cannot make an arrest for it without a warrant.

9. Civil Revn. No. 53 of 1968 was heard by this Bench and it was submitted in that case on behalf of the petitioner that when the offence under Section 5 of the Act was investigated by an Inspector of Police, it would be non-cognizable, as the Inspector could not make an arrest without a warrant. But when it was investigated by a Deputy Superintendent of Police, who could arrest without a warrant, it would be cognizable. This argument was accepted. Now the contention is that an offence under Section 5 of the Act is always non-cognizable. It may be noted that in Civil Rule No. 53 of 1968 the offence was investigated by an Inspector of Police and in the present case it was investigated by a Deputy Superintendent of Police. The new contention is now for our consideration.

10. At this stage we may deal with the history of the offence of bribery by

public officers Under the Criminal Procedure Code, most of the offences relating to public servants as such were non-cognizable As pointed out by the Supreme Court in *H N Rishbud v State of Delhi*, AIR 1955 SC 196, the underlying policy was that public servants who had to discharge their functions often under difficult circumstances, should not be exposed to the harassment of investigation against them on informations levelled, possibly by persons affected by their official acts, unless a magistrate was satisfied that an investigation was called for and on such satisfaction authorised the same

There was wide-spread corruption among the public servants in the wake of the second World War due to various controls, licences etc introduced for regulating trade and commerce So, the Act was passed in 1947 and it was laid down in Section 3, that offences under Sections 161, 165 and 165-A of the Indian Penal Code would be deemed to be cognizable offences for the purposes of the Criminal Procedure Code notwithstanding anything to the contrary contained therein It was also provided that a police officer below the rank of a Deputy Superintendent of Police would not investigate such an offence without the order of a Magistrate or make any arrest without warrant This proviso was omitted when Section 5-A of the Act was inserted

Then by the Code of Criminal Procedure (Amendment) Act 1955, Ss 161 and 165 were made cognizable and these sections were therefore omitted from Section 3 of the Act by an amendment of 1955 The result is that the offences under Sections 161, 165 and 165-A of the Indian Penal Code have become cognizable for the purposes of the Criminal Procedure Code But it is laid down in Section 5-A of the Act that no police officer below the rank of a Deputy Superintendent of Police can investigate any offence punishable under the above sections or Section 5 (2) of the Act without the order of a Presidency Magistrate or Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant

11. In the *Rishbud* case, AIR 1955 SC 196 mentioned above, the Supreme Court observed as follows:

"When, therefore, the Legislature thought fit to remove the protection of the public servants, in so far as it relates to investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank"

12. The learned Advocate-General contends that the above observation means that an offence punishable under S. 161 or 165 or 165A, Indian Penal Code is cognizable and Section 5A of the Act only provides a safeguard to public officers He further contends that an offence punishable under Section 5 (2) of the Act is also cognizable under the Criminal Procedure Code as the punishment prescribed by it may extend to imprisonment for seven years and Section 5A only provides a safeguard

13. We do not think that the interpretation given by the learned Advocate-General to the observation in question is correct The offences of bribery and corruption on the part of public officers, have been made cognizable for the purposes of the Criminal Procedure Code But when investigation is made into such an offence under the Act, a safeguard is provided in Section 5A of the said Act The Supreme Court does not say that such an investigation will be an investigation into a cognizable offence

14. The Criminal Law Amendment Act of 1952 provides for appointment of Special Judges for the trial of offences punishable under sections 161 or 165 or 165A, Indian Penal Code or section 5 (2) of the Act As said above, the question is whether an offence punishable under S 5 (2) of the Act is cognizable or non-cognizable In the *Rishbud* case, AIR 1955 SC 196 the Supreme Court observed that offences were divided into two categories, cognizable and non-cognizable "for the purposes of investigation" Section 155 (2) of the Criminal Procedure Code lays down that no police-officer shall investigate a non-cognizable case without the order of a magistrate Section 156 of the said Code confers powers on any officer in charge of a police-station to investigate a cognizable case without any order of a magistrate Hence if an offence punishable under section 161 or 165 or 165A, Indian Penal Code is investigated under S 156, Criminal Procedure Code as a cognizable offence, the court can punish only under those sections and the prescribed punishment is imprisonment of either description for a term which may extend to three years or with fine or with both

15. The offence of "misconduct" punishable under Section 5 (2) of the Act is defined in Section 5 "Misconduct" as defined there includes not only the offences under Ss 161, 165 and 165A of the Indian Penal Code, but also some new offences Hence a man who commits an offence under Section 161 or 165 or 165A of the Indian Penal Code can be punished either under Section 5 (2) of the Act or under the said section of the Indian Penal Code The punishment prescribed by Section 5 (2) of the Act is

imprisonment for a term which shall not be less than one year and may extend to seven years and also fine. The Court may, however, for special reasons to be recorded in writing impose a sentence of imprisonment of less than one year

If an offence under Section 161 or 165 or 165A, Indian Penal Code is to be punished under Section 5 (2) of the Act, the investigation must be under the Act and in that case no police-officer below the rank of a Deputy Superintendent of Police can investigate it without the order of a Presidency Magistrate or magistrate of the first class, as the case may be. An offence punishable under Section 5 (2) of the Act is non-cognizable as section 156, Criminal Procedure Code which authorises an officer in charge of a police-station to investigate a cognizable offence without the order of a magistrate, will not apply to investigation of an offence made under the Act. Thus, if a public servant is accused of accepting bribe, an investigation can be made under S. 156 of the Cr. P. C. followed by a trial in which he can be convicted under S. 161, Indian Penal Code. But investigation may also be made under Section 5A of the Act followed by a trial in which Sections 4 and 5 (3) of the Act may be applied and the accused convicted under Section 5 (2) of the Act. The investigation under Section 156 Cr. P. C. will be an investigation into a cognizable offence whereas investigation under Section 5A of the Act will be an investigation into a non-cognizable offence punishable under Section 5 (2) of the Act

16. The above interpretation appears to be in conformity with the policy of the legislature to give protection to the public officers. As explained above, the offence of "misconduct" as defined in Section 5 of the Act has a very wide meaning. It includes the offences under Sections 161, 165 and 165A, Indian Penal Code and some more offences. As pointed out by the Supreme Court in the *Rishbud* case, AIR 1955 SC 196 the Act creates two new rules of evidence, one under Section 4 and the other Section 5 (3) of an exceptional nature and contrary to the accepted canons of criminal jurisprudence. These sections introduce an exception to the general rule as to the burden of proof in criminal cases and shift the onus on to the accused. Section 5 (2) prescribes a very severe punishment. In view of all these, the investigation into an offence of "misconduct" which is punishable under section 5 (2) has been left to police-officers of high rank and consequently such an offence is non-cognizable

17. In the instant case, two charges were framed against the petitioner. The first charge is for conspiracy to commit an offence punishable under Section 5 (2) of the Act. As such an offence is non-

cognizable, sanction under Section 196A (2) of the Criminal Procedure Code was necessary. No such sanction was obtained. Hence the charge for conspiracy cannot stand. The second charge was for commission of offence punishable under Section 5 (2) of the Act "pursuant to the conspiracy". As no cognizance of any case of conspiracy could be taken for want of sanction, the second charge must also fail

18. The learned Advocate-General submits that if the charges are found to be invalid, the case should be sent back for reframing the charges. In this connection he cites the judgment of the Supreme Court in *The State of Andhra Pradesh v. Kandimalla Subbiah*, AIR 1961 SC 1241 in which the case was sent back for reframing of charges. In that case the charge of conspiracy referred to certain cognizable as well as to non-cognizable offences. Hence the question of reframing of the charge could arise. But in the case before us the charge of conspiracy refers to a non-cognizable offence only viz an offence punishable under Section 5 (2) of the Act. Such a charge cannot exist in the eye of law as the Court could take no cognizance of such a conspiracy without sanction under Section 196-A (2) of the Criminal Procedure Code. Hence the charges must be quashed

19. Mr. Malkani has strenuously argued that the materials before the Special Judge disclosed no offence for which any charge could be framed and that the charges are so vague that the accused could not defend himself properly. He submits that several distinct offences, arising out of different transactions have been amalgamated in one charge. He further submits that the trial has been conducted in a most dilatory and vexatious manner and hence the entire proceedings are liable to be quashed

20. We need not go into the above questions as we are quashing the charges on the ground already stated

21. The petition is allowed and the charges are quashed. The rule is made absolute

22. Criminal Revisions Nos 87, 112 & 143 of 1968—Criminal Revisions Nos 87, 112 and 143 of 1968 are also heard with this petition as they all arise out of the same case. The Delhi Special Police Establishment submitted charge sheet against Lt Col G. K. Apte (petitioner in Criminal Revision No 63 of 1968), Major Sappa Hamid, K. K. Banerjee, who was the Ordnance Officer, Contractor Israil Khan and three employees of the said contractor. The learned magistrate discharged K. K. Banerjee and the employees of the contractor but framed charges of conspiracy against Lt Col G. K. Apte, Major Sappa Hamid and Israil Khan.

Major Sappa Hamid and Israil Khan have filed Criminal Revisions Nos. 143 and 87 of 1968 respectively for quashing of the charges and the State has filed Criminal Revision No. 112 of 1968 against the order of discharge of K. K. Banerjee and the three employees of the contractor. All these cases are covered by our judgment in Criminal Revision No. 63 of 1968. In the result the petitions in Criminal Revisions Nos 143 and 87 of 1968 are allowed and the charges framed against the petitioners are quashed. The petition in Criminal Revision No. 112 of 1968 is rejected.

23. K. C. SEN, J.: I agree.

Ordered accordingly.

1970 CRI. L. J. 454 (Vol. 76, C. N. 104) =
AIR 1970 BOMBAY 134 (V 57 C 23)

VAIDYA, J.

Prabhudas Kalyanji Adhia, Appellant v. State, Respondent.

Criminal Appeal No 1626 of 1967, D/-9-4-1969

Drugs and Cosmetics Act (1940), Ss. 3 (b), 18 (c) and 27 — Drugs — Definition of D. D. T. is a drug — Sale of compound containing D.D.T. without obtaining licence — Conviction under S. 18(c) read with S. 27 is proper.

The accused himself had admitted that the substance which he sold without obtaining licence as D D. T. compound contained D D T.

Held having regard to the popular as well as dictionary meaning of the word 'drug', the D. D. T. compound which was sold by the accused was a drug irrespective of whether it was notified by the Government of India or whether it contained the chemical ingredients which the Public Analyst has found or not. The accused, therefore, was liable to be convicted under S. 18(c) read with S. 27. Conviction of the accused could not, however, be based on the report of the Public Analyst which did not mention protocol test (Para 4)

N V Adhia, for Appellant, V. T. Gam-bhirwala, Asst Govt Pleader, for the State

JUDGMENT: The only question which arises in this appeal filed by Prabhudas Kalyanji Adhia against his conviction under Section 18(c) read with Section 27 of the Drugs and Cosmetics Act, 1940, for manufacturing, stocking and selling on July 15, 1966 the substance which he described as 'D. D. T. compound' without a licence under the said Act is, whether the said D D. T. compound is a drug within the meaning of that Act

2. The accused did not dispute that at the relevant time he was manufacturing, stocking and selling at 121, Parel Tank Road,

Parel, Bombay 12, as proprietor of M/s. Hill Side Products D. D. T. compound, but he denied that the substance which he was manufacturing or selling was intended to be used for the destruction of vermin or insects which cause disease in human beings or animals as mentioned in a notification of the Government of India under Section 3(b)(i). He relied on a label which was used on his product which he produced. On one side of the label there is a picture of a theatre and it is written:

"Theatre Brand

D. D. T. Co

Technical DDT cum Malathion

Superior Quality

Hill-side Products, Bombay"

On another side of the label it is written:

"Not for medical use

Theatre Brand D D T is to be used with a sprayer for the control of horticultural and household pests other than those that cause disease in human beings or animals.

Caution:—Store well away from

Children, animals, food-stuffs and animal feed.

Wash hands after use.

Do not pour or spill on open fire.

Hill-side Products

Parel Tank Road, Bombay 12."

The accused did not dispute that D D. T. was actually used in this drug. His only contention, therefore, was that the product was not intended to be used as medicine and, therefore, it was not a drug. He also contended that the report of the Public Analyst, which was relied on by the complainant who was a Drug Inspector, did not mention the protocol test and hence the report was useless as evidence

3. The learned Magistrate was of the view that notwithstanding the contents of the label, the substance manufactured by the accused was drug. It is argued before me that the finding of the learned Magistrate was not right firstly because the report of the Public Analyst did not mention the protocol test and secondly because the substance manufactured, stocked and sold by the accused was not for medicinal use and the learned Magistrate erred in relying on the report and in holding in spite of what was mentioned in the label that the D D. T. compound sold by the accused was drug

4. The Magistrate convicted the accused under Section 18 (c) read with Section 27 of the Act and sentenced him to suffer simple imprisonment for one day and to pay a fine of Rs 200 or in default to suffer further imprisonment for 15 days. In my judgment, the conviction and sentence passed against the appellant must be confirmed although not for the reasons stated by the Magistrate. The Learned Magistrate was not right in relying on the report of the Public Analyst which did not mention the protocol test. Nevertheless, as the accused himself has admitted that the substance which he sold contained D.D.T. and it was sold as D.D.T.

compound,' it will be against commonsense to hold that it was not a drug. It is a well-established canon of construction that in dealing with matters relating to the general public, statutes are presumed to use words in their popular sense; *uti loquitur vulgus*. The Drugs and Cosmetics Act is dealing with matters relating to the general public. Its object is to regulate the import, manufacture, distribution and sale of drugs and cosmetics. There is no exhaustive definition which includes certain things which perhaps, according to popular usage, could not be included in the popular meaning of the word 'drug' or in respect of which there might be some doubt as to whether they would be considered as drugs according to the popular meaning of the word. Section 3 (b) reads:

3 (b): "Drug" includes —

(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals;

(ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette."

Therefore, it is necessary for us to take into consideration not merely the clause (i) and (ii) but to find out whether the substance which the accused manufactured, stocked and sold was a substance which was popularly considered as a drug. In Halsbury's Laws of England, Volume 17, Third Edition, page 448 para 831 it is stated:

"The term 'drug' includes medicine for internal or external use. In any case of doubt, it will be a question of fact for the determination of the court whether an article is a drug or not, and the answer will depend upon whether or not the substance was sold for use as medicine. An article is not necessarily a drug because it is included in the British Pharmacopoeia and may be used in the preparation of medicines, nor is an article a drug merely because it is sold under a designation which implies that it contains a drug in its composition, when in fact it does not."

In the present case, the accused himself has admitted that the substance which he sold as D. D. T. compound contained D. D. T. which is a well-known drug in the 20th century. The Oxford English Dictionary has described drug as 'an original, simple medicinal substance, organic or inorganic, whether used by itself in its natural condition or prepared by art, or as an ingredient in a medicine or medicament'. Having regard to the popular as well as dictionary meaning of the word 'drug', I have no doubt that the D. D. T. compound which was sold by the accused was a drug irrespective of whether it was notified by the Government of India

or whether it contained the chemical ingredients which the Public Analyst has found or not.

5. In the result, the conviction and sentence passed against the appellant are confirmed and the appeal is dismissed.

Appeal dismissed.

1970 CRI. L. J. 455 (Vol. 76, C. N. 105) =
AIR 1970 BOMBAY 135 (V 57 C 24)
CHANDURKAR, J.

R. J. Gujar, Appellant v. Jamnadas Gopalji and another, Respondents.

Criminal Appeal No. 65 of 1968, D/- 13-3-1969.

Prevention of Food Adulteration Act (1954), Ss. 16(1)(b), 19(2), 11 and 10 — Accused a dealer in "Anik Ghee" supplied by manufacturers in sealed tin — Accused refusing to sell to Food Inspector 450 Grams out of packing of 2 Kg. and insisting to purchase the sealed tin — Inspector refusing to purchase sealed tin as offered — Dealer, held not guilty under Section 16(1)(b) — Provisions of Ss. 10, 11 and 19 to be read harmoniously — S. 10 cannot be so construed as to deprive seller of his defence under S. 19(2) — Neither S. 11 of the Act nor Rr. 22 and 22A of the Rules, prohibits Food Inspector to purchase more than 450 grams of sample — (Prevention of Food Adulteration Rules (1955), Rr. 22 and 22A).

Where the accused who was a Kirana merchant and was also dealing in "Anik Ghee" supplied to him by the manufacturers in sealed tins under a warranty, refused to sell the Food Inspector a sample of 450 Grams after breaking open the sealed tin as required by the Food Inspector and insisted him to purchase the sealed tin of 2 Kg. but the Inspector refused to purchase the quantity more than 450 Grams under the impression that he had no power to purchase a quantity larger than 450 Grams.

Held that it could not be said that the accused had committed an offence of preventing the Food Inspector from taking a sample as contemplated by Section 16 (1) (b) of the Prevention of Food Adulteration Act. The failure to obtain the sample by the Food Inspector was essentially the result of a misapprehension of the legal position under which the Food Inspector himself was labouring, namely, that he was prohibited from purchasing more than 450 grams of the Food Article. Having regard to his right to take the benefit of the statutory defence under Section 19 of the Act the seller was entitled to insist that it should be purchased in the form which he received it from manufacturer. (Para 9)

There is nothing in Section 11 (1) of the Act or in Rr. 22 and 22A of the Prevention of Food Adulteration Rules which casts any positive obligation on the Food Inspector to

KM/LM/F103/69/LGC/M

purchase 450 grams alone and not a gram more, nor is there anything which can be read as a prohibition to purchase a larger quantity if he thought it necessary.

(Para 7)

The very fact that the quantity of sample of Ghee to be supplied for analysis under R 22 is specified to be an approximate quantity indicates that this rule is of directory nature and there is nothing in this rule which prevents the Food Inspector in a given case from sending a larger quantity.

(Para 7)

The provisions of Sections 10, 11 and 19 of the Act have to be read harmoniously and the provisions of Section 10 dealing with the powers of the Food Inspector cannot be so construed as to deprive the seller of the statutory defence under Section 19(2) of the Act. If Section 10 is construed as giving a power to the Food Inspector to insist on a sale of an article in sealed container received by the seller with a warranty from the manufacturer after breaking open the seal then such a construction will deprive the seller of the defence under Section 19(2) of the Act.

(Para 8)

A. M. Bapat, for Appellant, V. G. Palshikar (for No. 1) and M. M. Qazi, Asst. Govt. Pleader (for No. 2), for Respondents

JUDGMENT: This is an appeal filed by the Food Inspector of the Akot Municipal Council challenging the judgment of acquittal of the respondent No. 1, who was acquitted of the offence under Section 16(1)(b) of the Prevention of Food Adulteration Act, 1954, hereinafter referred to as the Act.

2. The facts in this case are not disputed. The respondent No. 1 is a Kirana merchant, who deals, among other articles, in a product called "Anik Ghee", which is product of Hindustan Lever Limited. The complainant went to the shop of the respondent No. 1 at about 11.20 A.M. on 19-8-1966 and asked him to sell him a sample of the quantity of 450 grams out of a sealed container weighing 2 kg which was kept for sale in the shop by the accused. The complainant served a notice on the respondent No. 1 that the sample of the food article "guaranteed pure Anik Ghee" which was stocked in his grocery shop for sale in the packing of 2 kg was to be sent for analysis, and therefore, 450 grams of "Anik Ghee" should be given to the Food Inspector. The respondent No. 1 received this notice and endorsed thereon that he sold packed tins of "Anik Ghee" of Hindustan Lever Limited, Bombay, and that he did not sell in small quantity from the packed tin. He further stated "if you require, you can purchase a packed tin."

2A. The Food Inspector, however, carried the impression that he had no power to purchase a quantity larger than 450 grams of sample of food-stuff, and therefore, he did not purchase the whole container. He prepared a memo reciting all these facts in the presence of the two Panchas whom he had taken with him. According to the Food Ins-

pector, this failure of the respondent No. 1 to sell 450 grams of Anik Ghee after breaking open the sealed container amounted to preventing him from taking a sample and he had thus committed an offence under Section 16(1)(b) of the Act. He, therefore, filed a complaint in the Court of the Judicial Magistrate, First Class, Akot, reciting all these facts. It is not necessary to reproduce all the contents of the complaint except the one relating to the explanation of the complainant why he did not purchase a larger quantity than 450 grams. In the complaint it is stated as follows.—

"Under rules made under the Act, the quantity of sample of the said Article of Food-ghee to be supplied to the Public Analyst for analysis is specified to be 150 grams. The quantity of sample is to be separated into three parts before sending one of the parts for analysis to the Public Analyst, and therefore the complainant had no authority to collect the quantity of the sample in any amount except than 450 grams."

(Underlining (here in ' ') is mine)

3. The complainant examined himself and admitted in the witness-box that the accused was willing to sell the whole tin if the complainant so wanted. He sticks to the explanation why he did not purchase the whole tin by stating that as per law he could not take more than 450 grams of sample. The defence of the accused was that he was not permitted to sell retail quantity of Anik Ghee and this defence was put to the complainant in cross-examination, and in cross-examination the complainant admitted that the accused had not sold any loose Ghee from the tin in question. The warranty which was issued to the dealer by the Hindustan Lever Limited in respect of this article was put to the complainant in cross-examination.

4. The trying Magistrate on these admitted facts found that there was no provision of law which prevented the Food Inspector from purchasing a larger quantity than 450 grams of sample. He thus took the view that because the complainant did not purchase the whole tin or was unable to purchase the same it did not mean that the accused prevented him from taking the sample. He, therefore, acquitted the accused. Against this acquittal this appeal has been filed.

5. The learned counsel for the appellant contends that having regard to the provisions of Rules 22 and 22-A of the Prevention of Food Adulteration Rules, 1955, the complainant could insist on a sale of 450 grams of Ghee in the sealed container and that since the respondent No. 1 had failed to sell this quantity he should have been held guilty of the offence under Section 16(1)(b) of the Act. He relied also on the provisions of Section 10(1)(a)(i) for the proposition that the power which is given to the Food Inspector by this Section to take a sample of any article of food from any person selling such article could not be construed in such a way

that he would be prevented from taking the necessary sample. This argument was supported by the learned Assistant Government Pleader appearing for the State also.

6. The learned counsel for the respondent No. 1, however, contended that there was no provision either in the Act or the Rules which prevented the Food Inspector from purchasing a sample of a quantity larger than 450 grams and as he was willing to sell the sealed container he had not committed any offence.

7. In order to appreciate the rival contentions it will be necessary to refer to certain provisions of the Act and the Rules. It is not disputed that the provisions of Section 10 (1) (a) (i) give power to the Food Inspector to take sample of any article of food from any person selling such article. Admittedly it was this power which the Food Inspector was seeking to exercise. But the real question is whether the failure of the Food Inspector to obtain the necessary sample from the respondent No. 1 was a result of any act on the part of the respondent No. 1 or whether it was a result of misapprehension of the legal position with regard to his powers under which the Food Inspector was, namely, that there was prohibition for him to purchase a quantity more than 450 grams by way of a sample. It is also an admitted position that Rule 22 prescribes the quantities of samples to be sent to the Public Analyst in respect of several articles specified therein. So far as Ghee is concerned, the quantity specified under Rule 22 is 150 grams. It is worth noting that these different quantities in respect of different articles which are specified under this Rule are only approximate quantities, because the column specifying the quantity of the article under this rule is itself headed as "approximate quantity to be supplied". The very fact that the quantity is specified to be an approximate quantity indicates that this Rule is of directory nature and there is nothing in this Rule which prevents the Food Inspector in a given case from sending a larger quantity. Section 11 of the Act prescribes the procedure to be followed by the Food Inspectors where a sample of food is taken for analysis and it requires that the sample taken is to be divided into 3 parts then and there and these parts are to be marked and sealed in such manner as its nature permits. Cl (c) of sub-s (1) of S. 11 of the Act requires one of the parts to be delivered to the person from whom the sample is taken, another part is to be sent for analysis to the Public Analyst and the third part is to be retained for production if necessary, in case any legal proceedings are taken or for analysis by the Director of the Central Food Laboratory under sub-section (2) of Section 13 of the Act. It is on the basis of this provision with regard to the division of the sample into 3 parts that it is contended that not more than 450 grams could be taken by the Food Inspector. Section 11 (1) nowhere specifies the quantity

to be taken by way of a sample. It is difficult to read the figure '450' into this Section, but probably the argument is that since 3 parts are to be made and one part which is to be sent to the Public Analyst is to consist of 150 grams it is intended that the total quantity must be of 450 grams. In a given case that may be so, but there is nothing in Section 11 (1) of the Act which casts any positive obligation on the Food Inspector to purchase 450 grams alone and not a gram more nor is there anything which can be read as a prohibition to purchase a larger quantity if he thought it necessary. Reliance is then placed on Rule 22-A of the Rules which is as follows:—

"22-A—Contents of one or more similar sealed containers having identical labels to constitute the quantity of food sample. Where food is sold or stocked for sale or for distribution in sealed containers having identical label declaration, the contents of one or more of such containers as may be required to satisfy the quantity prescribed in Rule 22 shall be treated to be a part of the sample."

On the basis of this rule it is contended that the Food Inspector was justified in asking the respondent No. 1 to break open the sealed container and sell 450 grams out of its contents to him. I am unable to spell out this power of the Food Inspector from the words of this rule. The obvious purpose of this rule appears to be that in a given case the contents of one of the containers may be such that it may not be sufficient to fulfil the requirement of Rule 22 and also the requirement of Section 11 where out of the 3 parts made, one is to be kept with the dealer and the other is to be retained by the Food Inspector. In a given case if the contents of a container are less than or even equal to 150 grams, it will be impossible to divide contents of that container into 3 parts so as to make available to the Public Analyst a quantity sufficient for analysis and also a sufficient quantity to be retained, if necessary, to be sent to the Director of the Central Food Laboratory under sub-section (2) of Section 13, and it may, therefore, be necessary to draw on the contents of another container in order to provide sufficient quantity of this food article. In the absence of this rule the accused might raise a defence that the different parts are not out of the same sample and it is obvious that it is to meet such a contention that this rule appears to have been made. But it is impossible to spell out from this rule a restriction on the power of the Food Inspector to purchase anything more than 450 grams or to insist upon the dealer to break open a sealed container and sell him a lesser quantity. Such a power does not appear to have been given by any of the provisions of either the Act or the Rules, either expressly or impliedly.

8. In this connection a reference to Section 19 also becomes necessary. Section 19 (2) enumerates the defences which are open

to a person who is prosecuted in respect of an offence under the Act and one of the defences is that the seller has purchased an article of food with a written warranty in the prescribed form and that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it. If we contemplate a case in which a dealer who sells articles received by him in sealed containers under a warranty from the manufacturer and that article, if it is sold in the same state, namely, the sealed condition in which he had received from the manufacturer, and that article is found to be adulterated, then there is a good defence to him that the goods were purchased under a warranty and they were sold in the same state in which he had received them. The accused is entitled to raise such a statutory defence especially in a case where the dealer deals in an article like the present case. The accused has produced a warranty from the Hindustan Lever Limited as contemplated by Section 19 (2) and if he had sold this article in a state other than the one in which he had received, namely, by retail sale after breaking open the seal of the manufacturer, he would have been deprived of the statutory defence under Section 19 (2) of the Act. The provisions of Sections 10, 11 and 19 of the Act will have to be read harmoniously and the provisions of Section 10 dealing with the powers of the Food Inspector cannot be so construed as to deprive the seller of the statutory defence under Section 19 (2) of the Act. If Section 10 is construed as giving a power to the Food Inspector to insist on a sale of an article in sealed container received by the seller with a warranty from the manufacturer after breaking open the seal then such a construction will deprive the seller of the defence under Section 19 (2) of the Act.

9. It will, therefore, be seen that the failure to obtain the sample by the Food Inspector was essentially the result of a misapprehension of the legal position under which the Food Inspector himself was labouring, namely, that he was prohibited from purchasing more than 450 grams of the food article. Secondly this is not a case in which the respondent No. 1 refused to sell an article of food. All that he insisted was that it should be purchased in the form in which he had received it from the manufacturer and in my view he was entitled to so insist, having regard to his right to take the benefit of the statutory defence under Section 19 of the Act. Under such circumstances, it cannot be said that the accused had committed an offence of preventing the Food Inspector from taking a sample as contemplated by Section 16 (1) (b) of the Act. The trying Magistrate was, therefore, right in acquitting the accused.

10. The result is that the appeal fails and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 458 (Vol. 76, C. N. 106) =

AIR 1970 CALCUTTA 162 (V 57 C 24)

AMARESH ROY AND S. N. BAGCHI, JJ.

The State, Appellant v. Golam Rasul, Respondent

Govt Appeal No. 6 of 1963, D/- 7-2-1969.

Criminal P. C. (1898), Section 492 — Provision in Legal Remembrancer's Manual of West Bengal does not enable Government of West Bengal to appoint any Public Prosecutor in respect of Central Territory of Andaman and Nicobar Islands — Calcutta High Court (Extension of Jurisdiction) Act (41 of 1953) — (Criminal P. C. (1898), S. 4(1)(i)) — (Civil P. C. (1908), S. 2 (7) (a)) — (Constitution of India, Art. 258 (1)).

The Calcutta High Court under the Act 41 of 1953 exercises jurisdiction as the High Court for the Andaman and Nicobar Islands. The State Government of West Bengal has not been authorised to perform the functions of the State Government of the Central Territory in Andaman and Nicobar Islands. That being so, the Legal Remembrancer of Government of West Bengal has no connection with the appeal from acquittal preferred by the Chief Commissioner of the Islands through the Public Prosecutor and therefore, has no authority to appoint any lawyer either for the appellant State or for the accused-respondent in the appeal. A provision in the Legal Remembrancer's Manual under which there is an arrangement between Central Government and the State Government of West Bengal for appointing lawyers does not enable the Government of West Bengal to appoint any Public Prosecutor in respect of the Central Territory under Section 492 Cr P. C. In an appeal against an order of acquittal it is the appellant-State, which is the Central Government in the case, that has the right to prosecute the appeal by appointing a properly authorised lawyer (Para 12)

Per Bagchi J. — Legal Remembrancer of West Bengal, can however, if appointed by Central Government by virtue of provisions of Art. 258 (1), read with S 492 (1) of Criminal P. C. (1898), represent Andaman and Nicobar Islands i. e. Central Government in any appeal or proceedings before Calcutta High Court and can also nominate counsel for the Union Territory to prosecute the appeal for and on behalf of the Union Territory and can also appoint, upon the High Court's approval, Counsel to represent the respondent accused. Case law reviewed (Para 28)

CM/LM/B155/69/MBR/R

Cases Referred: Chronological Paras

- (1952) AIR 1952 Madh B 13 (V 39)=
1952 Cri LJ 153=Madh BLJ 1955
HCR 1399, State v. Brindawan 25
- (1949) AIR 1949 PC 263 (V 36)=
50 Cri LJ 886 = 1949 All LJ
325, Bhagwan Das v. The King 20
- (1933) AIR 1933 Cal 118 (V 20) =
34 Cri LJ 662=ILR 60 Cal 603,
Tushar Kanti Ghosh v. Governor
of Bengal 26
- (1919) AIR 1919 Cal 203 (V 6)=
20 Cri LJ 170=ILR 46 Cal 544,
Supdt and Remembrancer of Legal
Affairs Bengal v. Tularam Baro-
dia 24
- Dipak Kumar Sen Gupta, for Appel-
lant; J. C. Sinha and I. A. Qayum, for
Respondent

AMARESH ROY, J. :— This appeal is from Andaman and Nicobar Islands and has been preferred by the State through the Public Prosecutor, Andaman and Nicobar Islands, against an order of acquittal passed by the Additional District Magistrate, Andaman and Nicobar Islands on 27th December, 1962 in a trial held in Port Blair in Criminal Case No 63/40 of 1962 in which the respondent Golam Rasool was charged for an offence under Section 408 of the Indian Penal Code alleged to have been committed by him on or about 16th December, 1959 at Long Islands as a servant in the employment of Forest Co-operative Chain Stores in respect of Rs. 977 08 nP. That amount was alleged to be the money recovered from the Forest Mazdoors against goods supplied to them on credit which the Range Officer Henry Lawrence sent through N. Kaniappa Mudaliar and alleged to have been received by Golam Rasool.

2-5. Case started on the report of the President of the Forest Co-operative Chain Stores Ltd, Chatham to the Superintendent of Police, Port Blair, in which it was alleged that Rs 2721 06 nP was found short

(His Lordship reviewed the evidence in the case and proceeded)

6. In that state of evidence the finding of the learned Magistrate at the trial court that prosecution has failed to prove that the money was entrusted to Golam Rasool is, in our view, the correct and proper finding. That being so, apart from other infirmities in the prosecution case and evidence referred to by the learned Magistrate in his judgment the order of acquittal is the only legal order that could be made in the case. We, therefore, dismiss the appeal.

7. Besides dismissing the appeal on merits, we also need mention a feature in prosecuting this appeal. As we have already mentioned the appeal was preferred under Section 417 (1) Cr. P. C. by

the State Government through the Public Prosecutor at Andaman and Nicobar Islands. In the Memorandum of Appeal it has been stated in paragraph 23 that the appeal was so filed by the Public Prosecutor — "Being directed by the Chief Commissioner, Andaman and Nicobar Islands in exercise of the powers of the State Government under Section 417 of the Code of Criminal Procedure (vide Order No 193 dated 27th January, 1963)". A copy of that Order was appended to the Memorandum of Appeal as Annexure 'B'. When the appeal was presented in the Islands it was admitted by the order of Sri Halve who was functioning as the Registrar in the Islands in the absence of the Chief Commissioner. Thereafter on 24th April, 1963, an order was made by a Division Bench of this Court (D. Mukherjee and D. N. Das Gupta, JJ.) in these terms —

"Consequent on the order of admission of the appeal we direct the respondent Golam Rasool to be re-arrested and released on bail to the satisfaction of the Chief Commissioner of the Andaman & Nicobar Islands. We also direct the issue of usual notices."

Order for bail was modified by an Order dated 15th of July, 1964 passed by the Division Bench (D. N. Das Gupta and A. C. Gupta, JJ.) It remains doubtful if a proper order admitting the appeal for hearing was made according to the Rules of the Appellate Side on this Court.

8. At the hearing before us Mr Dipak Sen Gupta appeared for the prosecution being so appointed by the Legal Remembrancer of West Bengal. Mr. Sen Gupta stated before us that he has not been authorised either by the Public Prosecutor of Andaman and Nicobar Islands, nor has he been appointed as Public Prosecutor for the purpose of this case by the State Government of Andaman and Nicobar Islands which is a Central Territory. Mr Sen Gupta frankly stated that he was in doubt whether he has proper authority and locus standi to represent the appellant in this appeal.

9. It also appears that upto a stage during the pendency of the appeal in this Court the accused-respondent Golam Rasool had not entered appearance through any lawyer appointed by him. At that stage the Legal Remembrancer of West Bengal Government appointed a learned Advocate of this Court Mr. Jogesh Chandra Sinha to represent and appear for the respondent in this appeal. Before the date of hearing, however, a learned Advocate Mr Inamdar Abdul Quayum has filed a Vakalatnama executed by the respondent Golam Rasool. The said learned Advocate Mr. Abdul Quayum appeared before us at the hearing. The situation thereby created was one of doubt and confusion regarding the

position of the learned Advocate Mr. Jogesh Chandra Sinha who was appointed to appear for defence by the Legal Remembrancer of West Bengal

10. It is also noticeable that during the pendency of the appeal in this Court, for the State the learned Dy. L R of West Bengal, Mr S N Banerjee appeared before the Division Bench on 24th April, 1963 and on 25th of July, 1964 another learned Advocate Mr. Prasan Chandra Ghosh appeared before the Division Bench for the State

11. The appeal was by the State Government under Section 417 (1) Cr P C. The territory of Andaman and Nicobar Islands is a Central Territory and the State Government in relation to that territory is the Central Government of India. The Chief Commissioner appointed by the Central Government exercises the functions of the State Government for that territory and the appeal was filed through the Public Prosecutor of Andaman and Nicobar Islands under the directions of the Chief Commissioner given under Section 417 (1) Cr P C

12. This High Court under the Act of 1953 exercises jurisdiction as the High Court for the Andaman and Nicobar Islands. The State Government of West Bengal has not been authorised to perform the functions of the State Government of the Central Territory in Andaman and Nicobar Islands. That being so, the Legal Remembrancer of Government of West Bengal has no connection with the appeal, and therefore, has no authority to appoint any lawyer either for the appellant State or for the accused-respondent in this appeal. The learned Dy. L R Mr. S N. Banerjee has referred to a provision in L R's Manual under which there is an arrangement between Central Government and the State Government of West Bengal for appointing lawyers. That provision, however, does not enable the Government of West Bengal to appoint any Public Prosecutor in respect of the Central Territory under Section 492 Cr P C. In an appeal against an order of acquittal. It is the appellant-State, which is the Central Government in the present case, that has the right to prosecute the appeal by appointing a properly authorised lawyer. Mr Dipak Sen Gupta was not so authorised

13. For the accused-respondent in the appeal a lawyer appointed by him on a Vakalatnama appeared before us at the hearing. The learned Advocate Mr. Jogesh Chandra Sinha, who was appointed by the Legal Remembrancer of West Bengal, was rendered functus officio and had no proper authority to represent the accused-respondent

14. Such state of confusion in the im-

portant matter of proper representation at the Bar of the parties in the appeal is likely to hamper proper disposal of the appeals for doing justice between parties. Governments concerned should be alive to the necessity of proper appointment of lawyers and avoid such confusion. As, however, the learned Advocates, who were before us, had prepared the case, we availed their assistance at the hearing of the appeal. They made their submissions on the evidence in the case and the order we have made above was upon hearing of all the three learned Advocates above mentioned

15. The appeal is dismissed. The Respondent Golam Rasool is discharged from the Bail bond.

16. **BAGCHI, J. :-** I agree with my Lord that the appeal be dismissed and the respondent, Golam Rasul, be discharged from the bail bond. But I like to add a few words of my own on some question of law

17. In the matter of appointment of the Public Prosecutor and the defence Counsel in this appeal, there has been utter confusion and violation of law. My Lord has been pleased to deal with the matter regarding how they were appointed to represent this appellant, the Union Territory of Andaman and Nicobar Islands and the respondent, Golam Rasul.

18. Section 492 of the Code of Criminal Procedure reads as follows —

"The Central Government or the State Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors (added by Sec 3 — Anti-Corruption Laws Amendment Act, Act XL of 1964 which came into force on and from 18-12-64)"

Section 4 sub-section (1), clause (i) of the Code of Criminal Procedure says —

"'High Court', in relation to the Andaman and Nicobar Islands, means the High Court in Calcutta, and in relation to any other local area, means the highest court of criminal appeal for that area"

19. The High Court of Calcutta has jurisdiction over the local area of the State of West Bengal as well as of the local area of the Andaman and Nicobar Islands. The Andaman and Nicobar Islands are a centrally administered territory. The executive power of the State Government under Art 154 of the Constitution vests in the Governor whereas the executive power of a centrally administered territory vests in the President under Art 73 of the Constitution.

20. Section 492 of the Code of Criminal Procedure, 1898 since the amendment in 1964 authorises the Central Government or the State Government, as the case may be, to appoint, generally, or

in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors. The emphasis lies in the expression 'in any local area' as occurring in Sec. 492, sub-section (1) of the Code of Criminal Procedure, 1898. Their Lordships of the Privy Council in the case of *Bhagwan Das v. The King*, reported in AIR 1949 PC 263, had to interpret the executive authority of the province under Section 49 of the Government of India Act, 1935, to make appointments to the post of a Public Prosecutor under Section 492, sub-section (1) of the Code of Criminal Procedure as it then stood, and in that context, their Lordships were pleased to observe that it was a part of the executive authority of the province to make appointments to the post of a Public Prosecutor and the executive authority of the province being vested by Section 49, Government of India Act, 1935, in the Governor, he only was entitled to appoint the Advocate General, a Public Prosecutor.

21. The local area of a State and the local area of an Union Territory are well defined. The Andaman and Nicobar Islands constitute an Union territory administered by the Central Government through the Chief Commissioner. The local area of an Union territory administered by the Chief Commissioner, as in the case of the Andaman and Nicobar Islands, is a centrally administered State and the executive power of a centrally administered State vests in the President of India under Art 73 of the Constitution. That is why in regard to appointments of Public Prosecutors in any local area in relation to a State or the Union, amendment had to be made in sub-section (1) of Section 492 of the Code of Criminal Procedure, 1898 in 1964 and the two groups of words in the alternative, the "Central Government" or the "State Government" had to be introduced in sub-section (1) of Section 492 of the Code of Criminal Procedure. The executive power of the Governor of a State in the matter of appointment of a Public Prosecutor by virtue of the authority of article 154 of the Constitution, read with Section 492, Sub-section (1) of the Code of Criminal Procedure, 1898, extends within the local area of a State, while the executive power of the President under Art 73 of the Constitution, read with Section 492, sub-section (1) of the Code of Criminal Procedure extends within the local area of an Union territory, such as, in the case of Andaman and Nicobar Islands.

22. Art 258 of the Constitution Cl (1) reads as follows—

"Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State,

entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends"

23. The President may, with the consent of the Government of a State, such as that of West Bengal, entrust to such State Government or its officers functions in relation to the appointment of a Public Prosecutor in regard to cases arising within the local area of the Union territory, as in the case of Andaman and Nicobar Islands, within which the executive power of the Union, vested in the President, extends. In the present appeal, neither the learned Counsel, appointed by the learned Legal Remembrancer of the State of West Bengal, representing the Union territory of Andaman and Nicobar Islands, the appellant, before us at the hearing of this appeal, nor the learned Counsel, appointed by the learned Legal Remembrancer of the State of West Bengal, appearing for the respondent who had not been initially represented, but later on, represented by the lawyer of his own choice, could enlighten us as to whether or not the President with the consent of the Government of West Bengal entrusted either the Government of West Bengal or the learned Legal Remembrancer, West Bengal, the function in relation to the appointment of a Public Prosecutor for the appellant, Andaman and Nicobar Islands, to prosecute with this appeal before this High Court at Calcutta for and on behalf of the said appellant, and to appoint a learned Counsel to represent the unrepresented respondent in this appeal before this Court. The Central Government could also appoint by virtue of the provisions of sub-clause (1) of Art 258 of the Constitution, read with sub-sec (1) of Section 492 of the Code of Criminal Procedure, 1898, with the previous consent of the State Government, the Legal Remembrancer, West Bengal as Public Prosecutor for the Union territory of Andaman and Nicobar Islands for the purpose of this appeal under Section 417, sub-section (1) of the Code of Criminal Procedure, and in that event, the learned Legal Remembrancer, West Bengal could well have nominated the learned Counsel appearing for the appellant, Union territory, to prosecute with the appeal for and on behalf of the Union territory, and could also appoint, upon this Court's approval, the learned defence Counsel to represent the respondent in this appeal before this Court. Neither of the learned Counsel appearing for either side, nor the learned D. L. R. of West Bengal could show us any notification under sub-art. (1) of Art 258, read with sub-section (1) of Section 492 of the

Code of Criminal Procedure whereby the President with the consent of the Governor of the State of West Bengal entrusted, by appointing L. R., West Bengal, a Public Prosecutor for and on behalf of the centrally administered territories of Andaman and Nicobar Islands with the function of prosecuting with this appeal before this Court. If there was such a notification the learned D. L. R. West Bengal, could well represent as Public Prosecutor for the Union Territory of Andaman and Nicobar Islands, the appellant, in this appeal before this High Court at the hearing of this appeal and he could have also authorised the learned counsel appearing for the appellant in this case to represent the Union territory of Andaman and Nicobar Islands, the appellant, in this appeal. In that event also, the learned L. R.'s nomination of the learned Defence Counsel representing the respondent in this appeal could have been approved by this Court at the hearing of this appeal.

24. In the case of Supdt and Remembrancer of Legal Affairs, Bengal v. Tularam Barodia, reported in AIR 1919 Cal 203, their Lordships of the Division Bench of this Court had to consider Section 417 of the Code of Criminal Procedure, 1898, in a case there the Superintendent and Remembrancer of Legal Affairs, Bengal, appointed by the then Bengal Government to be the Public Prosecutor in the case heard by the High Court at Calcutta. That was a case of appeal against acquittal filed by the Superintendent and Remembrancer of Legal Affairs, Bengal appointed by the Government of Bengal as it then was. Tracing the history of the office of the Legal Remembrancer, their Lordships at column '2' of the Report at p 203 observed—

"The appeal was presented by the Superintendent and Remembrancer of Legal Affairs, Bengal, who by notification of date 19th May, 1915, has been appointed by the Local Government to be by virtue of his office Public Prosecutor in all cases heard by this Court in the exercise of its appellate jurisdiction."

In that observation, their Lordships were pleased to pin-point the question of appointment of Superintendent and Remembrancer of Legal Affairs, Bengal, that emanated from the notification of the Local Government of Bengal and to put emphasis on the words 'Local Government'. In sub-section (1) of Section 492 of the Code of Criminal Procedure, the emphasis lies also on the words 'in any local area'.

25. In the case of the State v Brindawan, reported in AIR 1952 Madh B 13 (Dixit and Chaturvedi JJ.), their Lord-

ships observed at p. 14 of the report: "The appointment may be in respect to particular case or in respect to a particular class of cases or in regard to cases generally. But it must in any event be with reference to a local area for exercising the powers of Public Prosecutor. The words "in any local area" which occur in Section 492 qualify not only the words "for any specified class of cases" but also the preceding words "generally", or "in any case". It must be noted that the word "generally" has been used to contra-distinguish all cases from a particular case or a particular class of cases. If the words "in any local area," which are preceded by a comma are taken to qualify only the words "for any specified class of cases" and if the word "generally" is to be read independently of the words following it, the result would be to create a conflict between the jurisdiction of officers appointed as public prosecutors in regard to cases generally. A Public Prosecutor has specific powers under the Code and he cannot exercise these powers in regard to cases generally or in regard to a particular case or a class of cases unless the local area within which he is to exercise the powers is specified. In my view, under Section 492 of the Code it is incumbent on the Govt. to specify the local area within which the person appointed as Public Prosecutor is to exercise his powers." In regard to Andaman and Nicobar Islands, the High Court of Calcutta is also the High Court for that Union territory, but the Local Government of that territory and the Local Government of the State of West Bengal are two different and distinct constitutional and juristic entities and the executive power of those two Local Governments under the Constitution vests in two different Constitutional heads, having their well-defined local areas, former in the State of West Bengal, latter in the Union territory of Andaman and Nicobar Islands.

26. In the case of Tushar Kanti Ghosh v Governor of Bengal in Council, reported in AIR 1933 Cal 118 at p 118, their Lordships of the Division Bench of this Court had to consider the legal position of Legal Remembrancer of Bengal. Interpreting Section 4, Cl (t) and Section 493 of the Code of Criminal Procedure, their Lordships at page 120 of the Report expressed themselves as follows:

"The Legal Remembrancer is ex-officio Public Prosecutor on the appellate side of the Court and as such has the power to instruct counsel, his authority to act for the Local Government being in no way dependent on anything in the nature of a Vakalatnama or warrant of attorney."

In this observation their Lordships also emphasised on the words "His authority to act for the Local Government."

27. I respectfully accept the principle laid down in the decisions I have just now reviewed

28. In the present appeal, the "Local Government" means the Union territory of Andaman and Nicobar Islands and the "Local area" also relates to those Islands, a Centrally administered territory, administered by the Union of India, the executive power of which vests in the President under Art 73 of the Constitution (vide Constitution, Seventh Amendment Act, 1956, 1st Schedule — II, Union territories, Clause 5). In view of the principles, enunciated in the decisions discussed above, for the local area of a Centrally administered territory and for the local area of a State, the Central Government and the State Government have their respective powers under sub-section (1) of Section 492 of the Code of Criminal Procedure, 1898, as amended in 1964, to appoint a Public Prosecutor to represent the Union territory and the State, as the case may be, in any appeal or proceedings before this High Court. The High Court of Calcutta is undoubtedly the High Court for Andaman and Nicobar Islands — a Union territory as well as the High Court for the State of West Bengal. But the local area of the State of West Bengal and the local area of the Andaman and Nicobar Islands are distinct and different from each other and the executive power in the case of the State of West Bengal vests in the Governor of the State of West Bengal, and in the case of Andaman and Nicobar Islands, vests in the President of India. Accordingly, the State of West Bengal has appointed only for the local area of the State of West Bengal, the learned Legal Remembrancer, West Bengal, to be a Public Prosecutor having authority to represent the State Government before the High Court of Calcutta in its appellate jurisdiction which extends over the local area of the State of West Bengal and the local area of the Union territory of Andaman and Nicobar Islands. But the learned Legal Remembrancer of West Bengal cannot, unless appointed by the Central Government by virtue of the provisions of sub-art. (1) of Art. 258, read with sub-section (1) of Section 492 of the Code of Criminal Procedure, 1898, represent the appellant-Andaman and Nicobar Islands — a Centrally administered Union territory i.e. the Central Government in any appeal or proceedings before this High Court. I have observed earlier in this judgment that the learned Deputy Legal Remembrancer, West Bengal could not show us any notification appointing him a Public Prosecutor by the Central Government to represent

the appellant Union territory of Andaman and Nicobar Islands as the Public Prosecutor for that territory before this High Court in its appellate jurisdiction. The learned Legal Remembrancer of West Bengal, therefore, had no authority to appoint either the learned Counsel for the appellant or the learned Counsel for the respondent to represent either the appellant or the respondent respectively before us in this appeal since he himself had not been appointed by the Central Government to be a Public Prosecutor for the Union territory of Andaman and Nicobar Islands and to represent that territory in this appeal before the appellate jurisdiction of this Court. We hope that such illegality, as I have just now pointed out, would not recur in future. We have, however, with pleasure, acknowledged the assistance given to us in this appeal by the learned Counsel for the appellant and the learned Counsel for the respondent appointed by the learned L. R. of West Bengal and the learned Counsel for the respondent appointed by the respondent at the time of hearing of this appeal.

Order accordingly.

1970 CRI. L. J. 463 (Vol. 76, C. N. 107) =
AIR 1970 GOA, DAMAN & DIU 47
(V 57 C 8)

V. S. JETLEY, J. C.

Chandrakant Shantaram Cautonker.
Applicant v. State, Respondent
Ref. No. 11 of 1969, D/- 5-8-1969.

(A) Criminal P. C. (1898), Ss. 537(a), 342 and 242 — Motor Vehicles Act (1939), S. 48 (3) (vi) — Offence under S. 48 (3) (vi) — Summons case — Substance of accusation against accused explained to him — Accused denying charge — Failure to examine accused under S. 342 — No prejudice shown — S. 537(a) can be relied upon, assuming S. 342 is attracted.

Under Section 537(a) the conviction and sentence are not reversible on account of any error, omission or irregularity in any proceedings during the trial unless the error, omission or irregularity has in fact occasioned a failure of justice. Mere non-examination or defective examination is not a ground for interference unless prejudice is established. Real and not fanciful or imaginary prejudice is what is contemplated. Case law discussed.

(Para 4)

Therefore where in a prosecution under S 48(3)(vi), Motor Vehicles Act, which was a summons case, the substance of accusation against the accused was explained to him as required by S 242, Cr P C and he denied the charges and

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it was not shown that any prejudice was caused to the accused because of failure to examine him under S 342,

Held S 537(a) could be relied upon assuming S 342 was attracted. (Para 4)

(B) Motor Vehicles Act (1939), Ss. 48 (3)(vi) and 112 — Offence under S. 48 (3) (vi) — Accused not a previous convict — Maximum punishment of fine being Rs. 100/- sentence imposing a fine of Rs. 150/- cannot be sustained — Sentence of fine altered from Rs. 150/- to 100/-.

(Para 5)

(C) Criminal P. C. (1898), S. 342 — Whether applies to summons case — (Quaere) — Conflicting. Case law referred.

(Para 3)

Cases Referred: Chronological Paras

(1967) AIR 1967 Goa 60 (V 54)=
1967 Cri L. J. 746, Leofred Lobo
v State 4

(1963) AIR 1963 SC. 612 (V 50)=
1963 (1) Cri L. J. 495, Jaidev v
State of Punjab 4

(1962) AIR 1962 SC 1239 (V 49)=
1962 (2) Cri. L. J. 296, Rama
Shankar Singh v. State of W B 4

(1956) AIR 1956 SC. 536 (V 43)=
1956 Cri L. J. 940, Moseb Kaka
Chowdhry v. State of W B 4

(1956) AIR 1956 SC 731 (V 43)=
1956 Cri L. J. 1365, Chukkaranga
Gowda v. State of Mysore 4

(1940) AIR 1940 Bom. 314 (V 27)=
42 Cri L. J. 71, Emperor v
Kondiba Balaji 3

(1921) AIR 1921 Bom 374 (V 8)=
22 Cri. L. J. 17, Emperor v. Fer-
nandez 3

(1914) AIR 1914 Cal 663 (V 1)=15
Cri L. J. 190, Mohammed Hossain
v Emperor 3

S K Kakodkar, for Applicant, G V
Tamba, for State

ORDER:— This is a reference made by the learned Sessions Judge under Section 438 of the Code of Criminal Procedure. The recommendation, in substance, made by him is that the sentence of fine of Rs 150/- imposed by the learned Magistrate for an offence under Sec. 48(3) (vii) of the Motor Vehicles Act, 1939, read with the relevant rules thereunder and conditions of permit, is in excess of the maximum limit of fine provided under Section 112 and, therefore, it should be set aside.

2. The material facts leading to this reference are that the respondent was tried summarily for contravening the provisions of Section 48(3)(vi) of this Act (Clause (vii) mentioned is a mistake). The accusation against him was that on 26th September, 1968, at 19.30 hrs he had carried, in a bus driven by him, 30 extra passengers. The learned Magistrate dealt with this case as a summons case, under Chapter XX of the Criminal Procedure

Code (hereinafter referred to as "the Code"). He tried it summarily in accordance with the provisions of Chapter XXII of the Code. The respondent in his examination denied that he had taken extra passengers. The number of such extra passengers was 30. The prosecution examined four witnesses in support of the accusation against the respondent. In his defence the respondent examined a witness by name Sadananda Assonorcar. This witness deposed that the respondent had not carried extra passengers as alleged. The four prosecution witnesses deposed in clear terms that he had carried extra passengers as stated by them.

The learned Magistrate accepting the prosecution evidence convicted him under Section 48(3) (vii) and sentenced him to pay a fine of Rs 150/-. This sentence was passed by him presumably relying on Section 112 of the Act. A revision petition was filed against the conviction and the sentence recorded by the learned Magistrate in the Sessions Court. The learned Sessions Judge after considering the arguments urged on behalf of the respondent and the State, made the above recommendation. He also took note of the argument advanced on behalf of the respondent that failure to examine the respondent under Section 342 of the Code had caused prejudice to him. The learned Sessions Judge beyond taking notice of this argument did not make recommendation that the sentence of fine imposed should be set aside because of failure to comply with the provisions of this section. This, in short, is the background of the case leading to the reference.

3. Mr S K Kakodkar, learned counsel for the respondent, contends that the provisions of Section 342 are also applicable to summons cases and, in support of this contention, he cites 'Emperor v Kondiba Balaji', 42 Cri L. J. 71=(AIR 1940 Bom. 314). This is a Division Bench judgment of the Bombay High Court, and, according to the learned Chief Justice with whom his brother Judge agreed, every failure to comply with Section 342 of the Code does not necessarily vitiate the trial. If the Court is satisfied that failure to comply with the strict terms of the Section has caused no prejudice, the court should not interfere. The provisions of Section 537 of the Code would cover such a case. The learned Chief Justice also observed that Sec 342 applies even to summons cases tried summarily under Section 263 and the accused is prima facie prejudiced if no statement is taken at all. In reaching this decision the Division Bench relied on an earlier decision 'Emperor v Fernandez', AIR 1921 Bom 374 and also 'Mahommed Hossain v Emperor', AIR 1914 Cal 663, decided by the Calcutta High Court. As against this view, the learned Single Judge of

the Andhra Pradesh High Court came to the conclusion after considering the scheme of the trial of summons cases under Chapter XX and also mode of summary trial under Chapter XXII, that the provisions of Section 342 are not applicable to summons cases. There are some decisions of other High Courts, also on this point but for the purposes of disposal of this reference, it is really not necessary to decide the larger question whether the provisions of Section 342 are applicable to summons cases, in so far as second examination, as contemplated by Section 251-A of the Code is concerned.

This section is included in Chapter XXI relating to trial of warrant cases by Magistrate Section 342 in Chapter XXIV is under the heading "General provisions as to inquiries and trials". It does not say it applies to summons cases or warrant cases. It is silent and for good reasons. It is not in dispute in the instant case that the respondent was explained the substance of the accusation against him as required by Section 242 of the Code and he stated that he had not taken extra passengers. There was, therefore, examination of the respondent once but not the second time after the defence evidence was over. The defence evidence led by him is also on the point that he had not taken extra passengers.

4. Section 537 (a) of the Code can be relied upon in case of failure to examine the respondent second time in this case, assuming Section 342 is attracted. This section, to the extent it is material for the present purpose, provides that no sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of — (a) any error, omission or irregularity in the order, judgment or other proceeding before or during trial. Mr. Kakodkar is asked to explain how failure to examine the respondent second time caused prejudice to him. He states that if the respondent had been examined second time, after the defence evidence was over, he might have said that the prosecution witnesses had enmity against him and this may have enabled the learned Magistrate to discard the prosecution evidence. This is a hypothetical assumption with which we are really not concerned, apart from the fact that no such enmity was alleged against these witnesses either in cross-examination or in the examination under Section 342. The learned Magistrate would have referred to this allegation in his order. The Court takes no notice of imaginary situations or academic issues.

The provisions of Section 342 were examined by this Court at some length in 'Leofred Lobo v. State', AIR 1967 Goa 60 at p 76 and the following decisions of the Supreme Court were cited therein:—

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'Moseb Kaka Chowdhry v. State of West Bengal', AIR 1956 SC 536; 'Chukkaranga Gowda v. State of Mysore', AIR 1956 SC 731; 'Rama Shankar Singh v. State of West Bengal', AIR 1962 SC 1239 and 'Jaidev v. State of Punjab', AIR 1963 SC 612 at p. 620. The substance of these decisions is that under Section 537 (a) the conviction and sentence are not reversible on account of any error, omission or irregularity in any proceedings during the trial, unless the error, omission or irregularity has in fact occasioned a failure of justice. Mere non-examination or defective examination is not a ground for interference unless prejudice is established. The respondent knew what the prosecution case against him was. He denied he had carried extra passengers. Mr. Kakodkar is unable to satisfy the Court that any prejudice was caused to the respondent because of failure to examine him second time after the defence evidence was over. Real and not fanciful or imaginary prejudice is what is contemplated.

5. Mr. Kakodkar next submits that under Section 112 of the Act the maximum fine for the offence for which the respondent is convicted is Rs 100/-. In his reference, it appears, through inadvertence, the learned Sessions Judge said that the maximum fine is Rs 50/-. Mr. G. V. Tamba, holding a brief on behalf of Government Pleader, concedes that the maximum fine is Rs. 100/-. It is common ground that the respondent is not a previous convict. In this view of the matter, the order passed by the learned Magistrate imposing a fine of Rs 150/- cannot be sustained. The conviction of the respondent is maintained and the sentence of fine imposed by the learned Magistrate is altered from Rs 150/- to Rs 100/- and, in default of payment of this fine, the respondent should undergo simple imprisonment for 15 days, as directed by the learned Magistrate. The reference accordingly is accepted. The record and proceedings may be sent back to the learned Sessions Judge for further appropriate action as he deems fit. Order accordingly.

Reference accepted.

1970 CRI. L. J. 465 (Vol. 76, C. N. 108) =
AIR 1970 GOA, DAMAN & DIU 49
(V 57 C 9)

V S JETLEY, J. C

State. Applicant v Naguesh G. Shet Govenkar and another, Respondents

Criminal Revn Appln No 27 of 1969
and Criminal Appeal No 18 of 1969,
D/- 28-7-1969

(A) Penal Code (1860), Ss. 339, 390 —
Wrongful restraint— Obstruction to truck

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from proceeding in direction in which it wanted to proceed — No obstruction to its occupants from proceeding anywhere — No wrongful restraint. (Para 3)

(B) Probation of Offenders Act (1958), S. 4(1) and (2) — Release of accused on probation of good conduct — Consideration of report in terms of S. 4(2) is condition precedent — Word "shall" in S. 4(2) is mandatory.

Before releasing the accused on probation of good conduct under S 4 (1), it is obligatory on the Court to call for and consider the report of the Probation Officer in terms of S. 4(2). It is a condition precedent to the legality or validity of the order passed under sub-section (1) of S 4. Nullification of this order is a normal consequence of disobedience of the mandatory requirement in sub-section (2)

(Para 9)

It is true that the word "shall" in a statute does not necessarily mean that in every case it will have mandatory effect and not directory. Its meaning will vary in colour and content according to its context. It would involve injustice or inconvenience to offenders governed by sub-section (1) of Section 4 if sub-section (2) of Section 4 is regarded as directory and not mandatory.

(Para 7)

The consideration of the report of the probation officer is of the essence of the thing required under S 4(1). It is a matter of substance and not a matter of mere form. The probation officer is in a better position to know the character and antecedents of the offenders and his report is to be considered before making an order under sub-section (1) of S 4. Case law discussed

(Para 8)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 276 (V 54)=
1967 Cri. L. J. 285, State of M.P.
v Azad Bharat Finance Co

7

(1967) AIR 1967 Goa 95 (V 54)=
1967 Cri L J 1005, Raghunath
v Mrs T P. Faria

6

(1966) AIR 1966 All 291 (V 53)=
Jagdish Gandhi v. Legislative
Council, U.P.

7

(1965) AIR 1965 SC. 444 (V 52)=
1965 (1) Cri L J 360, Rattan Lal
v. State of Punjab

6. 7

(1964) 1964 (1) Cri L J 460=ILR
(1963) Mys 929, State of Mysore
v Saib Gunda

8

(1963) AIR 1963 SC. 1088 (V 50)=
1963 (2) Cri L J. 173, Rampi
Missar v State of Bihar

6

(1955) AIR 1955 S.C. 233 (V 42)=
1955 SCR 1104, Hari Vishnu v.
Ahmad Ishaque

7

(1954) AIR 1954 SC 210 (V 41)=
1954 SCR 892, Jagan Nath v. Jas-
want Singh

7

(1880) 5 A C 214=49 L J Q. B. 577,
Julius v. Bishop of Oxford

7

S. Tamba, Govt. Pleader, for the State (In both the Appeals), Y. H Kadam, for Respondents (In both the Appeals).

ORDER:— This is an appeal under Section 417(1) of the Code of Criminal Procedure directed against the judgment passed by the learned Sessions Judge, whereby he acquitted respondents Nos. (3) to (7) of the offence with which they were charged under Section 395 of the Penal Code. The respondents Nos (1) and (2) were convicted by him under Section 392 of the Penal Code. They were, however, released on probation of good conduct under Section 4 of the Probation of Offenders Act, 1958. The State felt aggrieved by this action and also by the decision directing acquittal of the respondents Nos (3) to (7). A revision petition under Section 439 of the Code of Criminal Procedure accordingly is filed by the State, objecting to the order releasing respondents Nos (1) and (2) on probation of good conduct under the Probation of Offenders Act, 1958.

2. The prosecution case, briefly stated, is that on 14th June, 1967 at about 6.30 a.m respondents Nos (1) to (7) stopped the truck carrying 60 gallons of liquor for distribution to various persons. The truck was prevented from proceeding in the direction intended and liquor was removed from the truck and kept in the balcony of the house of a washerman residing nearby. The Police were informed by complainant Atmaram Revodker about this illegal action on the part of these respondents. The Police after necessary investigation challaned them. They were charged by the learned Sessions Judge, Panjim, under Section 395 of the Penal Code (Dacoity).

3. I shall first consider the appeal filed by the State against acquittal of respondents Nos (3) to (7). It is conceded by learned Government Pleader at the Bar that on the evidence led by the prosecution the charge was not established against them either under Section 395 or Section 392. I have carefully gone through the record and I agree with him that as far as these respondents are concerned the ingredients of the offences under Sections 392 and 395 are not proved. It is extremely doubtful whether they participated in the crime. The learned Sessions Judge carefully considered the prosecution evidence and his conclusion that they are not guilty is supported by evidence. The evidence on identity of these accused is unconvincing, apart from the fact that it is vague. Section 390 of the Penal Code states that theft is 'robbery' if, in order to the committing of the theft or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or

wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint. It was the prosecution case in the Sessions Court that when these respondents prevented the truck carrying liquor from proceeding in the direction in which it wanted to proceed there was wrongful restraint to the complainant and some other occupants who were in the truck at the time of the incident. It is in evidence that the complainant and other occupants were not prevented from contacting the members of the Panchayat or the Police. What is 'wrongful restraint' is defined in Section 339 of the Penal Code. Under that section, "whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person". The admitted position is that the complainant and others were not obstructed from proceeding in any direction in which they wanted to proceed and, therefore, there was no wrongful restraint within the meaning of this section, apart from the fact that participation of these respondents as stated already is not proved. The word "person" in this section and also in Section 390, where theft is 'robbery', would not seem to include obstruction of a truck when its occupants are not obstructed. This word is to be understood in its ordinary sense. There is a presumption of innocence in favour of these respondents and this presumption is reinforced by an order of acquittal. The appeal fails and is accordingly rejected.

4. There remains the case of respondents Nos. (1) and (2) to be considered. The learned Government Pleader submits that the learned Sessions Judge should have called for the report of the probation officer as required by sub-section (2) of Section 4 of the Probation of Offenders Act, 1958 before releasing them on probation of good conduct. It is not his contention that the prosecution established the charge against them under S 395 of the Penal Code. He concedes fairly that in their case also this charge is not pressed. Mr Y. H. Kadam, learned counsel appearing for these respondents and the respondents acquitted, submits that it was not obligatory on the part of the learned Sessions Judge to have called for the report of the probation officer before releasing the respondents Nos (1) and (2) on probation of good conduct. He has not been able to support this submission by any reported decision. Be that as it may, I would discuss the scheme of the Probation of Offenders Act, 1958 (hereinafter referred to as 'the Act') and endeavour to show that it was obligatory on the part of the learned Sessions Judge to have called for the report of the probation

officer before releasing these respondents on probation of good conduct.

5. As will appear from its preamble, the Act was enacted to provide for the release of offenders on probation or after due admonition and for matters connected therewith. Section 2 is a definition provision on usual lines. Clause (b) defines "probation officer" as meaning an officer appointed to be a probation officer or recognized as such under Section 13. Section 3 contemplates release, after due admonition, of any person found guilty of having committed the offences specified thereunder. Sub-section (1) of Section 4 envisages release on probation of good conduct, of any person found guilty of having committed an offence not punishable with death or imprisonment for life. Sub-section (2) of Section 4 provides that before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case. Sub-section (1) of Section 6 imposes restrictions on imprisonment of offenders under twenty-one years of age. Under this sub-section, when any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which he is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. Sub-section (2) of this section lays down that for the purposes of satisfying itself whether it would not be desirable to deal under Section 3 or Section 4 with an offender referred to in sub-section (1), the Court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

Section 8 speaks of variation of conditions of probation. Under that provision if, on the application of the probation officer, any court which passes an order under Section 4 in respect of an offender is of opinion that in the interests of the offender and the public it is expedient or necessary to vary the conditions of any bond entered into by an offender, it may, at any time during the period when the bond is effective, vary the bond by extending or diminishing the duration thereof so, however, that it shall not exceed three years from the date of original order or by altering the conditions thereof or by inserting additional conditions therein. The proviso says that no

such variation shall be made without giving the offender and the surety an opportunity of being heard. The proviso conforms to the principles of natural justice. Sub-section (3) provides that notwithstanding anything hereinbefore contained, the court which passes an order under Section 4 in respect of an offender may, if it is satisfied on an application made by the probation officer, that the conduct of the offender has been such as to make it unnecessary that he should be kept any longer under supervision, discharge the bond or bonds entered into by him.

Sub-section (1) of Section 9 relates to procedure in case of offender failing to observe conditions of bond. It provides that if the court which passes an order under Section 4 in respect of an offender or any court which could have dealt with the offender in respect of his original offence has reason to believe, on the report of a probation officer or otherwise, that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may issue a warrant for his arrest. Section 13 contemplates appointment of a probation officer by the State Government. Section 14 speaks of duties of probation officers. Section 15 regards probation officer as a public servant by employing a deeming fiction. The other sections are not relevant for the present purpose. As will appear from sub-section (2) of Sections 4 and 6 and Sections 8 and 9, the probation officer plays an important role under the scheme of the Act.

6. In 'Ramji Missar v. State of Bihar', AIR 1963 SC 1088 (1089), their Lordships of the Supreme Court explained the object of the Act in the following words.—

"The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime."

It was also stated by their Lordships that this Act is a beneficial statute and, therefore, it is to be given wider interpretation. This decision is not directly to the point, but the above observations on the object of the Act, with respect, are apposite. In 'Rattan Lal v. State of Punjab', AIR 1965 SC 444, the scheme of the Act was considered in the context of Sections 3, 4 and 11 of the Act and it was held in that case that the calling for a report from the Probation Officer is a condition precedent for the exercise of the power under Section 6(1) of the Act by the Court.

The following observations of the Supreme Court are apposite—

"A court cannot impose a sentence of

imprisonment on a person under 21 years of age found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under S. 3 or S. 4 of the Act. For the purpose of satisfying itself in regard to the said action, under sub-s (2) of S. 6 of the Act the Court shall call for a report from the probation officer and consider the report, if any, and any other information relating to the character and physical and mental condition of the offender. After considering the said material the Court shall satisfy itself whether it is desirable to deal with the offender under S. 3 or S. 4 of the Act. If it is not satisfied that the offender should be dealt with under either of the said two sections, it can pass the sentence of imprisonment on the offender after recording the reasons for doing so. It is suggested that the expression "if any" in sub-s (2) of S. 6 indicates that it is open to the Court to call for a report or not; but the word "shall" makes it a mandatory condition and the expression "if any" can in the context only cover a case where notwithstanding such requisition the Probation Officer for one reason or other has not submitted a report. Briefly stated the calling for a report from the Probation Officer is a condition precedent for the exercise of the power under S. 6(1) of the Act by the Court."

It was also observed by the Supreme Court that—

"The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him."

In 'Raghunath v. Mrs. T. P. Faria', AIR 1967 Goa 95, this Court also had the occasion to consider the scheme of Sections 3, 4 and 11 of the Act and, in that connection, the following observations are not out of place—

"The Probation of Offenders Act, 1958, was enacted by Parliament to provide for the release of offenders on probation after due admonition and for matters connected therewith. The Act shifts emphasis from deterrence to reformation and from the crime to the criminal in accordance with the modern outlook on punishment. The emphasis is not on the individualization of acts but on the individualization of human beings. Reformation and rehabilitation of the offenders are the key notes of the Act."

7. The criminal law is concerned with wrongs and not with rights. It regards

not the person but society. It results not in a benefit to the party injured but in its satisfaction to the community. The scheme of the Act, however, is an exception where the criminal law regards the offenders governed by the scheme of the Act and also society and not only society. It will appear from the decision of their Lordships of the Supreme Court in Ratan Lal's case, AIR 1965 S.C. 444, that the requirement of sub-section (2) of Section 6 is mandatory; in fact, the calling for a report from the probation officer was regarded as a condition precedent for the exercise of the jurisdiction under sub-section (1) of Section 6. As, stated earlier, the probation officer plays an important role under the scheme of the Act. A comparison of the phraseology used in sub-section (2) of Sections 4 and 6 would seem to show that the requirement of sub-section (2) of Section 4 also is mandatory, or imperative. There is an injunction under this sub-section that before making any order under sub-section (1) the Court shall take into consideration the report, if any, of the probation officer concerned in relation to the case. There is a duty imposed on the Court to which relates to a benefit in favour of the offenders governed by Section 4, and sub-section (2) thereof is to be taken as requiring and not authorizing the performance of this duty, which is not intended to be at the discretion of the Court in so far as consideration of the report is concerned. It would involve injustice or inconvenience to offenders governed by sub-section (1) of Section 4 if sub-section (2) of Section 4 is regarded as directory and not mandatory.

Mr. Kadam submits that the words "if any" in sub-section (2) of Section 4 seem to show that it is not mandatory in its nature. This submission is without force. The observations of the Supreme Court in regard to the expression "if any" in the context of sub-section (2) of Section 6 will also seem to apply to the passing of the order under sub-section (2) of Section 4. The legislative command, in effect and substance, is that the Court shall take into consideration the report of the probation officer. For my part, as I see this matter, the word "shall" used in this sub-section is a word of command which is to be taken as mandatory, and not directory. It is true that the word "shall" in a statute does not necessarily mean that in every case it will have mandatory effect and not directory. Its meaning will vary in colour and content according to its context.

In 'Jagan Nath v Jaswant Singh', AIR 1954 S.C. 210 (214), the provisions of Section 82 of the Representation of the People Act, 1951 relating to impleading of parties, were regarded as directory in spite of the word "shall" used therein.

This was on the analogy of Order XXXIV, Rule 1, C.P.C. This section was not regarded as mandatory because non-compliance was not made penal. In 'Hari Vishnu v. Ahmad Ishaque', AIR 1955 SC 233 (245), relying on a famous case 'Julius v. Bishop of Oxford', (1880) 5 AC 214, where various rules were laid down for determining when a statute might be construed as mandatory and when as directory, the Supreme Court concluded that Rule 47(1) (a) to (c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules (1951) relating to ballot papers was mandatory. The word "shall" in this rule was not construed as meaning "may". In 'State of M.P. v. Azad Bharat Finance Co.', AIR 1967 SC 276 the provisions of Section 11(d) of the Opium Act, 1878 were regarded by the Supreme Court as directory or permissible and not mandatory or obligatory, notwithstanding the use of the word "shall". In 'Jagdish Gandhi v Legislative Council, U.P.', AIR 1966 All 291 (299) the learned Judges of the Allahabad High Court observed that the provision regarding the specification of time in Rule 75(1) (b) of the U.P. Legislative Council Rules of Procedure and Conduct of Business was directory in spite of the use of the word "shall" therein.

8. As will appear from sub-section (2) of Section 4, the consideration of the report of the probation officer is of the essence of the thing required. It is a matter of substance and not a matter of mere form. The probation officer is in a better position to know the character and antecedents of the offenders and his report is to be considered before making an order under sub-section (1) of Section 4. Mr. S. Tamba cites 'State of Mysore v. Saib Gunda', 1964(1) Cr. L. J. 460 (Mys), in support of his contention that the requirement of sub-section (2) of Section 4 is mandatory. It was held in this case that in the absence of a report from the probation officer under sub-section (1) of Section 4, the Magistrate had no authority to release the accused on probation of good conduct. This decision does not discuss the scheme of the Act in detail but the obiter dicta is relevant for our purpose. This opinion was really not necessary to the decision given, for Section 4 of the Act under which the learned Magistrate convicted the accused and thereafter released them on probation of good conduct was inapplicable in terms. The conviction of the accused was for the offence punishable under Section 326 of the Penal Code. The maximum punishment thereunder being imprisonment for life this section was not attracted.

9. It is common ground that the probation officer was not asked to give his report before directing release of respondents Nos. (1) and (2) on probation of

good conduct under Section 4 of the Act. It is thus clear that there was no compliance with the mandatory provision under sub-section (2) of Section 4. It appears consideration of report, in terms of sub-section (2) of Section 4, is a condition precedent to the legality or validity of the order passed under sub-section (1) of Section 4. Nullification of this order is a normal consequence of disobedience of the mandatory requirement in sub-section (2). In this view of the matter the order passed by the learned Sessions Judge is set aside and the revision petition filed on behalf of the State allowed. The learned Sessions Judge is directed to take into consideration the report of the probation officer before deciding the case on its merits.

Petition allowed

1970 CRI. L. J. 470 (Vol. 76, C. N. 109) =

AIR 1970 KERALA 88 (V 57 C 18)

M. U. ISAAC AND P. NARAYANA
PILLAI, JJ.

Executive Officer, Elavally Panchayat,
Appellant v Smt Rosa, Respondent

Criminal Appeal No 26 of 1968; Criminal R P No 143 of 1968 and O. P No. 2349 of 1968, D/- 22-1-1969, from orders of Sub-Magistrate's Court, Chowghat in C C No 248 of 67 and Dist Magistrate's Court Trichur, in Cri A No. 43 of 67 respectively in Cri. A. No. 26 of 68 and Cri. R P No 143 of 68

(A) Panchayats—Kerala Panchayats Act (32 of 1960), Ss. 96, 97 — Constitution of India, Art. 246, Sch. 7, List 1, Entry 52 and List 2, Entry 6 — Rice Milling Industry (Regulation) Act (1958), Ss. 5, 6 and 2 — Validity of Ss. 96, 97 of Kerala Act — State legislature held competent to enact law contained in these sections.

Sections 96 and 97 of the Kerala Panchayats Act and the Rice-Milling Industry (Regulation) Act deal with entirely different matters. Sections 96 and 97 of the Panchayats Act relate only to matters mentioned in Entry 6 of the State List; and they do not entrench on Entry 52 in the Union List. Therefore, the State Legislature was competent to enact the law contained in these sections. (Para 8)

The object of the Rice Milling Industry (Regulation) Act is to regulate the establishment of rice-mills in India for ensuring the adequate supply of rice, having regard to other relevant factors. The object of Section 96 of the Kerala Panchayats Act is to regulate the use of places within the Panchayat for purposes which in the opinion of the Government are likely to be offensive or dangerous to human life or health or property. Section 97 of this Act shows that its object

is to control and regulate the establishment of factories, workshops and workplaces and installation of machineries and manufacturing plants within the Panchayat. The Rules made under the Panchayats Act would show that what is relevant in the grant of permission under the above section is the safety of the establishment and the persons employed therein as well as considerations of public health and sanitation. (Para 8)

(B) Panchayats — Kerala Panchayats Act (32 of 1960), Ss. 96, 97, 76 — Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules (1963) — Validity of — Provisions relating to levy of fees are invalid — Issue of licenses and grant of permissions being conditional upon payment of such fees, provisions relating to issue of licenses and grant of permissions also become invalid — (Constitution of India, Art. 265).

The provisions contained in Sections 96 and 97 of the Panchayat Act and the Rules relating to levy of fees are invalid. As the issue of licenses and grant of permissions is conditional upon payment of such fees, the provisions relating to the issue of licenses and grant of permissions also become invalid. (Para 9)

There is no case that levy of fees is related to actual service, if any, rendered to the class of persons who pay the same, or that the total collections on this account are earmarked for rendering any service for those persons. On the other hand, the levy is admittedly for augmenting the general revenue of the Panchayat. Section 76 of the Panchayats Act expressly provides that all moneys received by the Panchayat shall constitute a fund called the Panchayat Fund, and that all taxes, duties, cesses, surcharge and fees levied under the Act or other law shall be included in the said fund. Such a levy is not a fee. Case law discussed. (Para 9)

(C) Constitution of India, Art. 246 — Entries in legislative lists — Interpretation of.

A legislature should be presumed to have acted within its powers, and if a statutory provision would yield to two constructions, one of which would make it beyond the power of the legislature and the other construction would bring it within that power, it has to be construed in the latter manner. AIR 1939 FC 1 & AIR 1962 SC 1044 & AIR 1959 SC 544 & AIR 1961 SC 459, Rel on.

(Para 6)

Cases Referred: Chronological Paras
(1969) AIR 1969 Ker 99 (V 56) =
1968 Ker LT 589 (FB), City Corporation of Calicut v Sadasivan 9
(1968) C A No 186 of 1966, D/-
10-12-1968=1969-1 SCWR 371,
Municipal Council, Cannanore v.
C T. Raman Nambiar 9

- (1968) 1968 Ker LT 776=ILR (1968) 2 Ker 416 (FB), Travancore Tea Estates Co., Ltd. v. Executive Officer, Elappara Panchayat 9
- (1968) 1968 Ker LT 789=1969 Ker LJ 220, Arya Vaidya Pharmacy Ltd. v. Health Officer, Ernakulam 9
- (1962) AIR 1962 SC 1044 (V 49)=(1963) 1 SCJ 106, Calcutta Gas Co., (Proprietary) Ltd. v. State of West Bengal 7
- (1961) AIR 1961 SC 459 (V 48)=(1961) 2 SCR 537, Hingir Rampur Coal Co., Ltd. v. State of Orissa 7
- (1959) AIR 1959 SC 544 (V 46)=1959 Cri LJ 660, State of Rajasthan v. G. Chavla 7
- (1939) AIR 1939 FC 1 (V 26)=1939 FCR 18, In the matter of C P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 7
- In CrI. Appeal No. 26/68—
V. M. Nayanar, for Appellant; S. Easwara Iyer, L. Gopalakrishnan Potti and C. S. Rajan, for Respondent
- In CrI R P. No 143/68—
S. Easwara Iyer, for Petitioner, V. M. Nayanar (for No 1) and State Prosecutor (for No. 2), for Respondents
- In O. P. No 2349/68.—
S. Easwara Iyer, L. G. Potti, C. S. Rajan, P. Sankarankutty Nair, E. Subraman, for Petitioner, State Prosecutor (for No. 1) and T. M. Krishnan Nambiar, V. Sivaraman Nair, V. M. Nayanar and K. C. Sankaran, (for No 2), for Respondents.

M. U. ISAAC, J. :— These three cases are the sequence of a criminal complaint which the Executive Officer of Elavally Panchayat, (hereinafter referred to as the appellant) instituted as C C No 248 of 1967 in the Sub-Magistrate's Court, Chowghat against one Smt Rosa (hereinafter referred to as the respondent)

2. The respondent is the owner of a rice mill. The rice-milling industry is regulated by the Rice Milling Industry (Regulation) Act, 1958. She got a permit under Section 5 and a license under Section 6 of the Rice Milling Industry (Regulation) Act for the establishment of a rice mill within the Elavally Panchayat; and accordingly she established a rice mill. Section 96 of the Kerala Panchayats Act, 1960 provides that the Panchayat may with the previous approval of the Director notify that no place in the Panchayat area shall be used for any of the purposes specified in the rules made in this behalf being purposes for which in the opinion of the Government, are likely to be offensive or dangerous to human life or health or property, without a licence issued by the executive authority and except in accordance with the conditions specified in such license. Section 97 of this Act provides, among other

things, that no person shall, without the permission of the Panchayat and except in accordance with the conditions specified in such permission, instal in any premises any machinery, not being a machinery exempted by rules. Section 98 empowers the Government to make rules in respect of matters mentioned in Sections 96 and 97. Section 129 of the Act contains the general rule making power. In exercise of the powers conferred by the aforesaid sections of the Panchayats Act, the Government made the Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules 1963, (hereinafter referred to as the Rules). The rules provide for the issue of licenses under Section 96 and the issue of permits under Section 97. Schedule I to the Rules specifies the purposes which in the opinion of the Government are likely to be offensive or dangerous to human life or health or property.

3. The Elavally Panchayat has notified under Section 96 of the Kerala Panchayat Act that no place within its limit shall be used for any of the above purposes without a license from the executive authority. Item 83 in Schedule I to the Rules is "Machinery — Used for industrial Purposes."; and item 94 is "Paddy — Boiling or husking by machinery (for other than domestic use)". Rice mills fall under both the above items. So, under the Panchayat Act and the Rules a person has to take a license and also obtain a permit for establishing a rice mill within the limits of the Elavally panchayat. The respondent did not obtain from the appellant any license for use of the mill premises. She applied for permission, to which she did not get a reply; and she started the mill without either the license or the permission. Section 109(3) of the Panchayats Act provides that, if orders on an application for a license or permission are not communicated to the applicant within 30 days or such longer period as may be prescribed in any class of cases, after the receipt of the application by the executive authority, the application shall be deemed to have been allowed. Section 132 of this Act provides, among other things, that whoever contravenes any of the provisions of the Act mentioned in Schedule III thereto shall be punishable with fine which may extend to the amount mentioned therein. Sections 96 and 97 are included in the above Schedule.

4. In the light of the above provisions of the Panchayat Act and the Rules, the appellant instituted C C. 248 of 1967, charging the respondent with offences under Sections 96 and 97 of the Act. The trial court found the respondent guilty under Section 96 and sentenced her to pay a fine of Rs. 20/-. It acquitted her of the offence under Section 97, holding

that, for failure of the executive authority to communicate its orders on the application for permission within the prescribed period, the respondent should be deemed to have been granted the permission. The appellant filed the present Criminal Appeal from the acquittal of the accused under Section 97 of the Panchayats Act. The respondent filed an appeal before the District Magistrate, Trichur from the order of conviction under Section 96. The appeal was dismissed, and the Criminal Revision Petition has been filed from the judgment of the District Magistrate. The respondent has stated several grounds in the Revision Petition; but at the hearing, the learned counsel urged only two points of law which she has raised against the maintainability of the prosecution. They are:—

(i) Sections 96 and 97 of the Kerala Panchayats Act, in so far as they relate to rice-milling industry, are beyond the legislative competence of the State Legislature, as rice mill industry falls under entry No. 52 in List I of the VII Schedule to the Constitution, and Parliament alone has the power to make any law in respect of that matter, and

(ii) The issue of licenses under Section 96 and permissions under Section 97 of the Panchayats Act is conditional upon payment of prescribed fees. What is prescribed as "fees" is not really fees; and the provisions relating to the issue of licenses and permissions under the Act and the Rules are, therefore, invalid.

The respondent has also filed the Original Petition for a writ of mandamus or other appropriate writ or order directing the appellant not to insist on the respondent to take out a license under Section 96 or to obtain the permission under Section 97 of the Kerala Panchayats Act, on the ground that these sections, in so far as they relate to rice-milling industry, are beyond the legislative power of the State Legislature. Therefore, the only question which arises for decision in the Original Petition is the first point raised in the Criminal Revision Petition. This point also arises for decision in the Criminal Appeal. The State of Kerala is also a respondent in the O. P.

5. I shall now consider the first point. Article 246 of the Constitution provides as follows:—

"246 Subject-matter of laws made by Parliament and by the Legislatures of States —

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1),

the Legislature of any State also have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2) the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the Territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

Entry 52 in List I of the VII Schedule to the Constitution reads:

"Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest"

The Rice-milling Industry (Regulation) Act 1958 was enacted by Parliament to regulate the rice-milling industry. Section 2 of this Act declares that it is expedient in the public interest that the Union should take under its control the rice-milling industry. Consequently, rice-milling industry fell within entry No. 52 in List I. By virtue of Article 246 of Constitution, Parliament alone has power to make laws in respect of this matter; and the Rice Milling Industry (Regulation) Act is such a law made by Parliament. Section 5 of this Act deals with grant of permits for establishment of a rice mill. It reads as follows.—

"5(1) Any person or authority may make an application to the Central Government for the grant of a permit for the establishment of a new rice mill; and any owner of a defunct rice mill may make a like application for the grant of a permit for recommencing rice-milling operation in such mill.

(2) Every application under sub-section (1) shall be made in the prescribed form and shall contain the particulars regarding the location of the rice mill, the size and type thereof and such other particulars as may be prescribed

(3) If, on receipt of any such application for the grant of a permit, the Central Government is of opinion that it is necessary as to do for ensuring adequate supply of rice, it may, subject to the provisions of sub-section (4) and sub-section (5), grant the permit specifying therein the period within which the mill is to be established or, as the case may be, the mill is to re-commence rice-milling operation and such other conditions as it may think fit to impose, in accordance with the rules, if any, made in this behalf.

(4) Before granting any permit under sub-section (3), the Central Government

shall cause a full and complete investigation to be made in the prescribed manner in respect of the application and shall have due regard to —

(a) the number of rice mills operating in the locality;

(b) the availability of paddy in the locality;

(c) the availability of power and water supply for the rice mill in respect of which a permit is applied for;

(d) whether the rice mill in respect of which a permit is applied for will be the huller-type, sheller-type or combined sheller-huller type;

(e) Whether the functioning of the rice mill in respect of which a permit is applied for would cause substantial unemployment in the locality;

(f) such other particulars as may be prescribed.

(5) In granting a permit under this section the Central Government shall give preference to a defunct rice mill over a new rice mill.

(6) A permit granted under this section shall be effective for the period specified therein or for such extended period as the Central Government may think fit to allow in any case."

Section 6 of the above Act deals with grant of licenses for carrying on rice-milling operation and that section reads as follows:—

"6(1) Any owner of an existing rice mill or of a rice mill in respect of which a permit has been granted under Section 5 may make an application to the licensing Officer for the grant of a licence for carrying on rice milling operation in that rice mill.

(2) Every application under sub-section (1) shall be made in the prescribed form and shall contain the particulars regarding the location of the rice mill, the size and type thereof and such other particulars as may be prescribed.

(3) On receipt of any such application for the grant of a licence, the licensing officer shall grant the licence on such conditions (including, in particular, conditions relating to the polishing of rice), on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed

(4) A licence granted under this section shall be valid for the period specified therein and may be renewed from time to time for such period and on payment of such fees and on such conditions as may be prescribed."

The above two sections show that the location of the rice mill is a relevant and important factor in the matter of granting the permit and the licence. The permit is given for establishing a rice-mill in a certain locality, and the licence is

given for operating that mill in that locality.

6. The contention of the respondent is that Sections 96 and 97 of the Kerala Panchayats Act are so wide in language as to apply to rice-milling industry, and that, in so far as they would apply to that industry, they are beyond the legislative power of the State, or those sections should be construed in such a way as not to apply to rice-milling industry. A legislature should be presumed to have acted within its powers, and it is a well settled canon of construction that if a statutory provision would yield to two constructions, one of which would make it beyond the power of the legislature and the other construction would bring it within that power, it has to be construed in the latter manner. I shall now read Sections 96 and 97 of the Kerala Panchayats Act;

"96. Purpose for which places may not be used without a licence — The Panchayat may with the previous approval of the Director notify that no place in the Panchayat area shall be used for any of the purposes specified in the rules made in this behalf being purposes which in the opinion of Government, are likely to be offensive or dangerous to human life or health or property, without a licence issued by the executive authority and except in accordance with the conditions specified in such licence:

Provided that no such notification shall take effect until the expiry of sixty days from the date of its publication

97 Permission for the construction of factories and the installation of machinery — No person shall, without the permission of the Panchayat and except in accordance with the conditions specified in such permission —

(a) construct or establish any factory, workshop or work-place in which it is proposed to employ steam power, water power or other mechanical power or electrical power; or

(b) instal in any premises any machinery or manufacturing plant driven by any power as aforesaid, not being machinery or manufacturing plant exempted by the rules"

The Panchayats Act deals with matters "falling under entries 5 and 6 in List II of the VII Schedule to the Constitution; and these entries read.—

"5 Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-Government or village administration.

6. Public health and sanitation; hospitals and dispensaries".

The power of a State Legislature to make laws on any of the matters enumerated in List II is subject to the power of the Parliament to make laws on any of the matters enumerated in List I. This is expressly stated in Article 246 of the Constitution. So, there can be no doubt that, if Section 96 or 97 of the Panchayats Act contains a law in respect of rice-milling industry, that law would be beyond the legislative power of the State Legislature. The learned counsel appearing for the appellant and the State of Kerala contended that Sections 96 and 97 of the Panchayats Act relate entirely to matters mentioned in entry 6 in List II, and that they do not relate to any matter mentioned in Entry 52 in List I, even though the provisions contained in the said sections may incidentally refer to a matter falling under Entry 52 in List I. They submitted that the above two Entries are entirely different, that the application of Ss. 96 and 97 of the Panchayats Act to a matter falling under Entry 52 in List I was only incidental, and that such incidental application would not make them a law on a matter mentioned in entry 52.

7. Disputes with regard to the legislative spheres of the Parliament and the State Legislature are inevitable in the federal character of our Constitution, even in spite of the non-obstante clause in Article 246 (1). Dealing with this problem, Sir Maurice Gwyer C. J. stated in *In the matter of C P Motor Spirit Act*, AIR 1939 FC 1:

"... an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result, and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it

can theoretically possess."

The principles stated in the above passage have been approved by the Privy Council and our Supreme Court in *Calcutta Gas Co (Proprietary) Ltd. v State of West Bengal*, AIR 1962 SC 1044, the question arose whether the West Bengal Oriental Gas Company Act, 1960, which the State Legislature enacted, was void, on the alleged ground that it related to a matter mentioned in Entry 52 of List I. The State contended that it related entirely to the matter mentioned in entry 25 in List II. This entry reads—

"Gas and gas works".

Dealing with these apparently overlapping entries, Subba Rao, J. in his judgment of the Court, said:—

"The power to legislate is given to the appropriate Legislatures by Art 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation, they demarcate the area over which the appropriate Legislatures can operate. It is also well settled that widest amplitude should be given to the language of the entries. But some of the entries in the different Lists or in the same Lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them."

After examining the relevant provisions of the Constitution, the learned Judge held—

"It is, therefore, clear that the scheme of harmonious construction suggested on behalf of the State gives full and effective scope of operation for both the entries in their respective fields while that suggested by learned counsel for the appellant deprives Entry 25 of all its content and even makes it redundant. The former interpretation must, therefore, be accepted in preference to the latter. In this view, gas and gas works are within the exclusive field allotted to the States. On this interpretation the arguments of the learned Attorney-General that, under Art 246 of the Constitution, the legislative power of State is subject to that of Parliament ceases to have any force, for the gas industry is outside the legislative field of Parliament and is within the exclusive field of the Legislature of the State. We therefore, hold that the impugned Act was within the Legislative competence of the West Bengal Legislature and was, therefore, validly made."

Reference may be made to two more decisions of the Supreme Court. In *State of Rajasthan v G Chawla*, AIR 1959 SC 544 the question arose whether the Ajmer (Sound Amplifiers Control) Act, 1953 was void being a law falling under Entry 31 of the Union List. This entry reads:—

"Post and Telegraphs; Telephones. Wireless, broadcasting and other like forms of communications."

The State contended that it was a law in respect of the matter mentioned in Entry 6 of the State List and that it was within the power of the State Legislature. Entry 6 in the State List reads:—

"Public Health and Sanitation; hospitals and dispensaries."

Upholding the contention of the State, Hidayatullah J. delivering the judgment of the court, said:—

"On a view of the Act as a whole, we think that the substance of the legislation is within the powers conferred by Entry No. 6 and conceivably Entry No. 1 of the State List, and it does not purport to encroach upon the field of Entry No. 31 though it incidentally touches upon a matter provided there. The end and purpose of the legislation furnishes the key to connect it with the State List. Our attention was not drawn to any enactment under Entry No. 31 of the Union List by which the ownership and possession of amplifiers was burdened with any such regulation or control, and there being thus no question of repugnancy or of an occupied field, we have no hesitation in holding that the Act is fully covered by the first cited Entry and conceivably the other in the State List."

In the *Hingir Rampur Coal Co. Ltd. v. State of Orissa*, AIR 1961 SC 459, the validity of the Orissa Mining Areas Development Fund Act, 1952 which was passed by the State Legislature, was attacked on the ground that it related to a matter falling under Entry 52 of the Union List. The State contended that the Act related to a matter in Entry 23 of the State List, and that it was, therefore, within the power of the State Legislature. This entry reads—

"Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."

In dealing with above contention, Gajendragadkar J. who delivered the majority judgment of the Court, examined the relevant provisions of the State Act and also of the Industries (Development and Regulation) Act, 1951 which the Parliament has made in respect of the matter in Entry 52 of the Union List; and he held that the object of the State Act was the development of mining area in the State while that of the Central Act was to regulate the scheduled industries with a view to their development, and that these Acts, therefore, occupied different fields. The validity of the State Act was upheld on the above ground.

8. I shall now examine the constitutional validity of Sections 96 and 97 of the Kerala Panchayats Act. The Parlia-

mentary declaration contained in Section 2 of the Rice Milling Industry (Regulation) Act shows that it was made in the public interest to take rice-milling industry under the control of the Union. Section 5 of this Act, which deals with grant of permits for establishing rice-mills, shows that the relevant considerations in the matter are the number of rice-mills operating in the locality, availability of paddy in the locality, availability of power and water for the mill, extent of unemployment that may be caused by the establishment of the mill etc., and that the permit is granted only if the Central Government is of opinion that it is necessary to do so for ensuring adequate supply of rice in the locality. Section 6, which deals with grant of licenses, shows that the relevant considerations are the location of the mill, the size and type thereof and other prescribed particulars; and they are granted subject to conditions relating to the polishing of rice. So the object of the Rice-Milling Industry (Regulation) Act is to regulate the establishment of rice-mills in India for ensuring the adequate supply of rice, having regard to other relevant factors. The object of Section 96 of the Kerala Panchayats Act is to regulate the use of places within the Panchayat for purposes which in the opinion of the Government are likely to be offensive or dangerous to human life or health or property. Section 97 of this Act shows that its object is to control and regulate the establishment of factories, workshops and workplaces and installation of machineries and manufacturing plants within the Panchayat. The Rules would show that what is relevant in the grant of permission under the above section is the safety of the establishment and the person employed therein as well as considerations of public health and sanitation. Therefore, Sections 96 and 97 of the Panchayats Act and the Rice Milling Industry (Regulation) Act deal with entirely different matters. Sections 96 and 97 of the Panchayats Act relate only to matters mentioned in Entry 6 of the State List; and they do not trench on Entry 52 in the Union List I, therefore, hold that the State Legislature was competent to enact the law contained in these sections.

9. The next question for consideration is whether Sections 96 and 97 of the Kerala Panchayats Act and the provisions of the Rules relating to issue of licenses and grant of permissions are valid, as they are made conditional on payment of the prescribed fees. There is no case that levy of fees is related to actual service, if any, rendered to the class of persons who pay the same, or that the total collections on this account are earmarked for rendering any service for those persons. On the other hand, the levy is

admittedly for augmenting the general revenue of the Panchayat. S. 76 of the Panchayats Act expressly provides that all moneys received by the Panchayat shall constitute a fund called the Panchayat Fund, and that all taxes, duties, cesses, surcharge and fees levied under the Act or other law shall be included in the said fund. It is well settled by the decisions of this Court, and also by a very recent decision of the Supreme Court that such a levy is not a fee — vide *City Corporation of Calicut v. Sadasivan*, 1968 Ker LT 539 = (AIR 1969 Ker 99) (FB). *Travancore Tea Estates Co. Ltd. v. Executive Officer, Elappara Panchayat*, 1968 Ker LT 776 (FB). *Arya Vaidya Pharmacy Ltd. v. Health Officer, Ernakulam*, 1968 Ker LT 789 and *Municipal Council, Cannanore v. C. T. Raman Nambiar* (Decision of the Supreme Court dated 10-12-1968 in C. A. No. 186 of 1966 (SC)). The provisions contained in Sections 96 and 97 of the Panchayats Act and the Rules relating to levy of fees are, therefore, invalid. As the issue of licenses and grant of permissions is conditional upon payment of such fees, the provisions relating to the issue of licenses and grant of permissions also become invalid.

10. In the light of my decision on the above two points, O. P. No. 2349 of 1968 should be dismissed; and I do so. Criminal R. P. No. 143 of 1968 is allowed; and Criminal Appeal No. 26 of 1968 is dismissed. The order of conviction and sentence of fine passed against the respondent is set aside, and the fine, if already recovered, is directed to be refunded to the respondent.

11. NARAYANA PILLAI, J. :— I agree.

Order accordingly.

1970 CRI. L. J. 476 (Vol. 76, C. N. 110) =

AIR 1970 ORISSA 47 (V 57 C 21)

A MISRA, J

Bala Bariha and others, Petitioners v. Kathu Bariha, Opposite Party

Criminal Revn No 80 of 1967, D/- 14-7-1969, against order of Sub-Divisional Magistrate, D/- 27-9-1966.

Penal Code (1860), Ss. 441, 447 — Intent to annoy etc., must be the aim of entry — Natural consequence of entry and knowledge of such consequence not sufficient — Dominant intention to assert possession — Assertion resulting in annoyance to complainant — Entry could not be said to be criminal trespass.

In order to establish that the entry of the accused on the complainant's property was with intent to annoy, intimidate or insult within the meaning of Ss 441

and 447, Penal Code, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry. It is not sufficient to show merely that the natural consequence of the entry was likely to be annoyance, etc and that this likely consequence was known to the persons entering. In deciding whether the aim of the entry was the causing of such annoyance, etc the Court has to consider all the relevant circumstances, including the presence of knowledge that its natural consequences would be such annoyance, and including also the probability of something else than the causing of such intimidation being the dominant intention which prompted the entry. AIR 1964 SC 986, Rel on

(Para 5)

Accused was serving as gomasta-jhankar under the complainant for 7 or 8 years and claimed to have been given the piece of land in question towards his remuneration; while the complainant said that he was giving five pudugs of paddy every year as remuneration. There was no clear finding whether the remuneration consisted of paddy, as alleged by the complainant, or the land had been given as asserted by the accused. In the circumstances, when all that the accused did was to plough the land and spread manure asserting that he had been in possession of that land in lieu of his wages, it will not be reasonable to conclude that the dominant intention of making the entry was to annoy the complainant. On the other hand, the dominant intention in all probability was to assert possession over the land. Merely because by such assertion annoyance resulted to the complainant, it could not be said that the trespass amounted to criminal trespass punishable u/s 447 I P C.

(Para 5)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 986 (V 51) =

1964 (2) Cri LJ 57, Smt Mathri

v. State of Punjab

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P V B Rao, for Petitioners; B Naik, for Opposite Party.

ORDER: Each of the petitioners has been convicted u/s 447 I P C. and sentenced to a fine of Rs 20/-; in default, to undergo S. I. for one week.

2. The complainant's case, in brief, is that as ex-jhankar of village Srigida, he was all along in possession of the jhankar service lands situate in the village. For some time, he engaged petitioner no 1 to work as gomasta-jhankar under him on payment of five pudugs of paddy per year as his wages. Subsequently, when petitioner no 1 stopped working as gomasta, he stopped payment of his remuneration. On the date of occurrence, it is alleged that petitioner no. 1 along with his relations the other petitioners, tres-

passed into the disputed land which is a part of the jhankar lands in possession of the complainant, ploughed it and spread manure. Thereby they committed criminal trespass. The defence is that complainant had given the disputed land to petitioner no. 1, while he was working as gomasta-jhankar and he has been in possession of the same. Being in possession, he ploughed the land and spread manure and has been falsely implicated. The other petitioners are his relations whose assistance he took in performing the ploughing operations.

3. There is no dispute that the land in question is a part of the jhankar lands and that complainant is ex-jhankar. There is also no dispute that petitioner no. 1 for 7 or 8 years worked on gomasta-jhankar being engaged by the complainant. According to the complainant, for the service of petitioner no. 1, he had offered some land, but when the latter pleaded inability to cultivate, he gave him wages in the shape of five pudugs of paddy annually, while according to the defence, the land in question had been given to him and he was in possession of it as gomasta-jhankar. The learned Magistrate, on a consideration of the evidence, accepted the version of the complainant and convicted the petitioners.

4. Learned counsel for petitioners assails the conviction only on one ground. He contends that to sustain a conviction u/s 447 I. P. C., it is incumbent on the prosecution to prove, and for the court to give a finding that the accused committed trespass with one of the intents specified in section 441 I. P. C., i.e. intent to insult, annoy, intimidate or commit an offence.

In this case, all that has been proved by the complainant is that on the date of occurrence, petitioners ploughed the land and spread manure. Accepting the complainant's version that he was in possession of the disputed land, the learned Magistrate has observed that the action of petitioners in the circumstances has definitely caused annoyance to the complainant who was in possession of the jhankar lands. This being the finding of the learned Magistrate, it is argued by Mr. Rao, learned counsel for petitioners that the requisite intention to justify a conviction u/s 447 I. P. C. has not been proved and the mere fact that the action of petitioners resulted in annoyance to the complainant, even if true, cannot amount to criminal trespass. On the other hand, for the opposite party, it is contended that when the land in question was in possession of the complainant, the action of petitioners cannot but be construed as one done with intent to annoy him.

5. The principle of law has been clear-

ly explained by the Supreme Court in the decision reported in AIR 1964 SC 986, *Smt. Mathri v. State of Punjab* as follows:

"In order to establish that entry on the property was with intent to annoy, intimidate or insult, it is necessary for the court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry; that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the persons entering, that in deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult, the court has to consider all the relevant circumstances, including the presence of knowledge that its natural consequences would be such annoyance, intimidation or insult and including also the probability of something else than the causing of such intimidation, insult or annoyance, being the dominant intention which prompted the entry." All that the learned Magistrate has found was that the action of petitioners caused annoyance to the complainant who was in possession of the disputed land. He has failed to determine taking all circumstances into consideration including the natural consequence of the act and the plea of the petitioners whether the dominant intention of the entry was to cause annoyance.

In the present case, admittedly, petitioner no. 1 was serving as gomasta-jhankar under the complainant for 7 or 8 years and claims to have been given the piece of land in question towards his remuneration. While the complainant says that he was giving five pudugs of paddy every year as remuneration, there is no clear finding whether the remuneration consisted of paddy, as alleged by the complainant, or the land had been given as asserted by petitioner no. 1. In the circumstances, when all that the petitioners did was to plough the land and spread manure asserting that petitioner no. 1 has been in possession of that land in lieu of his wages, it will not be reasonable to conclude that the dominant intention of making the entry was to annoy the complainant. On the other hand, the dominant intention in all probability was to assert possession over the land. Merely because by such assertion annoyance resulted to the complainant, it cannot be said that the trespass amounted to criminal trespass punishable u/s 447 I. P. C.

6. In the result, the revision is allowed, the conviction and sentence are set aside and the petitioners are acquitted.

Revision allowed.

1970 CRI. L. J. 478 (Vol. 76, C. N. 111) =

AIR 1970 ORISSA 50 (V 57 C 23)

B K. PATRA, J.

Gopinath Das, Petitioner v. Alekh Sahu and others, Opposite Parties.

Criminal Revn No 171 of 1967, D/- 5-9-1969, against order of Judicial Magistrate, Daspalla, Campnayagarh, D/- 12-12-1966

(A) Criminal P. C. (1898), S. 439—Revision against acquittal at instance of private party — Interference with finding of acquittal by Court when justifiable — Mere possibility of arriving at contrary conclusion on basis of evidence on record does not justify interference.

It is true that it is open to the High Court in revision to set aside an order of acquittal even at the instance of private parties although the State might not have thought fit to appeal, this jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. No criteria has been laid down for determining such exceptional cases which would cover all contingencies. But some cases of this kind which would justify the High Court in interfering with the finding of acquittal in revision are (1) where the trial court has no jurisdiction to try the cases but has still acquitted the accused, (2) where the trial court has wrongly shut out evidence which the prosecution wished to produce, (3) where the court of appeal has wrongly held evidence which was admitted by the trial Court to be inadmissible, (4) where material evidence has been overlooked either by the trial Court or by the appeal court and (5) where the acquittal is based on a compounding of the offence which is invalid under the law. AIR 1962 SC 1788, Foll.

(Para 5)

A mere possibility for another court to arrive at a contrary conclusion on the basis of evidence on record cannot by itself be a reason to set aside the order of acquittal.

(Para 5)

(B) Penal Code (1860), S. 102 — Right of private defence — How long continues — Attempt to assault accused with weapon by the injured—Weapon snatched away by accused—No evidence to show any attempt by injured to snatch back the weapon or to secure any other weapon — Inflicting of injuries by accused on the injured by the weapon held could not be in private defence.

The right of private defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence

although the offence might not have been committed, and it continues as long as such apprehension of danger to the body continues. Whether a person claiming to exercise right of private defence had any reasonable apprehension of danger or not depends on the state of his mind at that time and it is for him to say what danger he apprehended. Outsiders cannot divine what was passing in his mind.

(Para 6)

Where the accused alleged that since the injured person wanted to assault him with a tangia which he (injured) was holding at the time of occurrence, the accused snatched away the weapon and assaulted him with it till the injured fell down on the ground and there was no evidence or allegation by the accused himself that there was any attempt on the part of the injured person either to snatch back the weapon or to secure any weapon from elsewhere.

Held, that the accused had failed to establish that the right of private defence was available to him. So long as Tangia was in the hands of the injured and the latter attempted to kill him, accused had every justification to apprehend danger to his body and consequently he would have been justified to inflict such injury as he would have considered necessary to save himself. But once the Tangia was snatched away by accused from the injured, there could not have been any further apprehension in the mind of accused. If there was evidence to show that after the Tangia was seized from injured the latter was attempting to catch hold of some other weapon, that could have been a sufficient justification for accused to exercise his right of private defence.

(Para 6)

Cases Referred: Chronological Paras
1962) AIR 1962 SC 1788 (V 49)=

1963 (1) Cri LJ 8, K. Chinna-swamy Reddy v. State of A. P.

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Kanungo and R. N. Mohanty, for Petitioner; R. K. Kar and R. Mohanty, for Opposite Parties

ORDER:— This application in revision is directed against an order of the Magistrate, First Class, Daspalla acquitting the opposite parties, thirteen in number, who were prosecuted on charges under Section 148/426 I P C and five of whom, namely, Dener Sahu, Mahajan Naik, Kir-tan Padhan, Mohan Naik and Udaya Sahu also under Sections 326/324/323, I P C. The case against them is that at about 6 A M on 28-3-1965 they formed themselves into an unlawful assembly and being armed with Katis Tangias, Farsa and Lathis restrained Lingaraj Das while he was proceeding on a cycle and dealt blows on him thereby causing simple and grievous hurt on his person. The opposite parties pleaded not guilty. Their case

is that there are two factions in the village for the last about 12 years, Lingaraj Das (injured) and Arakhit Barik are leaders of one faction while petitioners Alekh Sahu and Danei Sahu are leaders of the other faction, and there was a number of cases between them. Some time previous to the occurrence, Lingaraj Das was convicted under Section 307 I. P. C. for attempting to commit the murder of one Lokanath Misra and in that case some of the members of the opposite party were witnesses for the prosecution. Since then, Lingaraj Das used to move on cycle with a Farea for his personal safety. In mouza Kurum Bankatara where the occurrence took place and to which place all the parties belong, Dutikeshwar Mahadeb of which one Lokanath Misra was the Managing trustee owns some lands and opposite party no. 2 Mahajan Naik was cultivating some of the lands of the deity as a bhag tenant. After Lokanath Misra, Durga Madhab Deo became the trustee of the temple and Lingaraj Das as an agent of Durga Madhab Deo was looking after the affairs of the deity. On the date preceding the occurrence, Lingaraj Das wanted to dislodge Mahajan Naik from the land which he was cultivating. On the date of occurrence when Lingaraj Das was passing by the side of Mahajan's house on a cycle, the latter questioned him as to why he was attempting to dispossess him from the land. Lingaraj got down from his cycle and taking up the Tangia which he was holding wanted to assault Mahajan with it. Mahajan thereupon snatched away the Tangia from Lingaraj and assaulted him with it till Lingaraj fell down on the ground. None of the other members of the opposite party was present by the time of the said occurrence. The essence of the defence therefore, is that while Mahajan admitted having caused some injuries on Lingaraj but pleaded that he did so in exercise of his right of private defence, the other members of the opposite party denied having taken part in the occurrence.

2. Lingaraj Das examined as P. W. 1 stated that on the date of occurrence when he was coming down from Kabelpur bridge on a cycle, opposite party Alekh Sahu suddenly came from the house of Mahajan and stood in front of his cycle and catching hold of the handle of his cycle asked him as to why he was creating trouble in the village. He therefore got down from the cycle. Immediately thereafter the other members of the opposite party who were variously armed with Katis and lathis gathered at the spot. Danei Sahu attempted to give a blow on his neck with a Kati. He tried to ward off the blow by his left hand and the Kati blow fell on his wrist. He then fell down. Then Mahajan Naik

attempted to give a blow with his Kati on his neck and he again warded it off with his left hand and received an injury on the left upper arm. He then became unconscious and did not know who caused the several injuries on his person. The doctor examined as P. W. 2 who had examined Lingaraj Das found as many as eleven injuries on the person of Lingaraj. These consisted of bleeding incised injuries on the left wrist, left humerus and the left rib; lacerated injuries on the left elbow, left humerus, left tibia, and compound fractures of the left ulna, left tibia; and abrasions on the fore-head and right arm. Some of the injuries were grievous in nature while the rest were simple. Five other witnesses were examined on the prosecution side to prove the occurrence besides the investigating officer. The defence examined one witness to support the stand taken by Mahajan Naik and he stated inter alia that excepting Mahajan Naik, the other members of the opposite party were not present at the occurrence.

3. The learned Magistrate considered the evidence on record, disbelieved the prosecution case regarding participation of the members of the opposite party excepting Mahajan Naik in the occurrence and acquitted them. He accepted the plea of Mahajan that he caused injuries on Lingaraj Das in exercise of his right of private defence and also ordered his acquittal.

4. Two contentions were advanced by Mr. Kanungo appearing for the petitioner the first being that the prosecution case disclosed the commission of an offence under Section 307, I. P. C. and that as such the Magistrate had no jurisdiction to decide the case finally but that he should have committed the opposite parties to the Court of Session and secondly that on the evidence placed before the Court, the acquittal of the opposite parties and at any rate that of Mahajan is unjustified and perverse. In the charge sheet that was laid by the Police before the Magistrate no mention was made that an offence under section 307 I. P. C. had been committed. No exception was taken from any quarter when after perusing the papers placed before the Court under section 173 Cr. P. C., the learned Magistrate framed the charges which did not include one under section 307, I. P. C. In order no 23 dated 17-8-1966, the Magistrate recorded that he had been approached by the prosecution side. He therefore submitted the records before the S. D. M., Nayagarh stating that in the circumstances he did not like to try the case. The S. D. M. sent back the records to him stating that he did not see any reason why the learned Magistrate should not proceed with the trial of the case and that if he felt that his judicial functions

were in any way interfered with he could draw up appropriate proceedings against the persons concerned. It is thereafter that the Court Sub Inspector filed an application before the Magistrate for framing an additional charge under section 307 I P. C. which after due consideration was rejected by the learned Magistrate on the ground that the case diary did not disclose any materials to warrant framing of such a charge. The contention of Mr. Kanungo is that two blows with the Kati were aimed at the neck of Lingaraj Das which fortunately he warded off and that this shows that the intention of opposite parties was to kill him. But the further case of the prosecution is that after these two blows were given to Lingaraj he became unconscious and that thereafter the opposite party members dealt several other blows on the person of Lingaraj. If the intention of opposite parties was to kill him they could have easily done so after Lingaraj fell down unconscious. The fact that they did not do so shows that the intention of the assailant or assailants was not to cause his death. In the circumstances, the charges framed by the learned Magistrate were correct and he had jurisdiction to proceed with the case.

5. So far as his second contention is concerned, it is true that it is open to the High Court in revision to set aside an order of acquittal even at the instance of private parties although the State might not have thought fit to appeal, but it is now well settled that this jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. No criteria has been laid down for determining such exceptional cases which would cover all contingencies. But some cases of this kind which would justify the High Court in interfering with the finding of acquittal in revision have been indicated by their Lordships of the Supreme Court in *K. Chinnaswamy Reddy v State of Andhra Pradesh*, AIR 1962 SC 1788. The cases enumerated are (1) where the trial Court has no jurisdiction to try the cases but has still acquitted the accused, (2) where the trial court has wrongly shut out evidence which the prosecution wished to produce, (3) where the court of appeal has wrongly held evidence which was admitted by the trial court to be inadmissible, (4) where material evidence has been overlooked either by the trial Court or by the appeal court and (5) where the acquittal is based on a compounding of the offence which is invalid under the law. Here, the learned Magistrate has duly considered the evidence

let in on the prosecution side regarding the participation of the opposite parties in the occurrence and has given certain reasons in support of his finding that excepting opposite party Mahajan Naik, the others did not take any part in the occurrence. It may be possible for another Court to arrive at a contrary conclusion on the basis of evidence on record but this by itself cannot be a reason to set aside the order of acquittal. Every aspect of the prosecution case has been considered by the learned Magistrate and he has given reasons in support of his finding. The order of acquittal of the opposite parties except Mahajan cannot be interfered with.

6. The case of Mahajan Naik however stands on a different footing. Mahajan has admitted having caused certain injuries with his Kati on Lingaraj Das. But he pleaded that he did so in exercise of his right of private defence. If the establishment of this plea involves the appreciation of evidence and circumstances and the learned Magistrate has appreciated them in a particular manner, the High Court in revision would not substitute its own appraisal of the situation and set aside the order of acquittal. But in this case I find that even if all that Mahajan has said in support of his defence is accepted in toto, his plea is not established. He stated that Lingaraj Das attempted to kill him with his Tangia and therefore he (Mahajan) snatched the Tangia from Lingaraj and then inflicted the injuries on the latter with the sharp edge of the Tangia and also with its handle. The right of private defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence although the offence might not have been committed, and it continues as long as such apprehension of danger to the body continues. So long as the Tangia was in the hands of Lingaraj and the latter attempted to kill him, Mahajan had every justification to apprehend danger to his body and consequently he would have been justified to inflict such injury on Lingaraj as he would have considered necessary to save himself. But once the Tangia was snatched away by Mahajan from Lingaraj, there could not have been any further apprehension in the mind of Mahajan. In fact, Mahajan had not stated what further injury he apprehended from Lingaraj. If there was evidence to show that after the Tangia was seized from Lingaraj the latter was attempting to catch hold of some other weapon, that could have been a sufficient justification for Mahajan to exercise his right of private defence. But that is not the case here. Whether a person claiming to exercise right of private defence had any

reasonable apprehension of danger or not depends on the state of his mind at that time and it is for him to say what danger he apprehended. Outsiders cannot divine what was passing in his mind. When Mahajan himself had not chosen to speak out what danger he had at that moment expected from Lingaraj who was completely disarmed by him, and when he did not say that at that moment there was any attempt on the part of Lingaraj either to snatch back the Tangia from him or to secure any weapon from elsewhere, it is manifest that Mahajan has failed to establish that the right of private defence was available to him. The learned Magistrate has taken a wrong view of law while considering this aspect of the defence case.

7. In the result, I would allow this application so far as it relates to opposite party No. 2 Mahajan Naik, set aside the order of acquittal passed against him and direct that the case be sent back to the learned Magistrate for disposal according to law. The order of acquittal in respect of the other opposite parties is maintained.

Order accordingly.

1970 CRI. L. J. 481 (Vol. 76, C. N. 112) =

AIR 1970 PATNA 97 (V 57 C 13)

G. N. PRASAD, J.

Mithila Saran Singh and another, Petitioners v. Nihora Singh and others, Opposite Parties

Criminal Revn No 1649 of 1968, D/- 23-1-1969, against order of Ist Class Magistrate, Dinapur, D/- 1-8-1968.

(A) Criminal P. C. (1898), Ss. 146 (1) and 145 (4) — Incompetent reference by Magistrate — Civil Court is not clothed with any jurisdiction so that it can neither record any finding nor give directions to Magistrate as to what course he should adopt — Proper course for Civil Court is to return the reference — Magistrate, after return of reference proceeding under S. 145 (4) instead of making a proper reference — Order cannot be said to be without jurisdiction. AIR 1965 Pat 411, Foll. (Paras 9 and 10)

(B) Criminal P. C. (1898), S. 145 (4) — Competency of witnesses to speak about possession is no ground to rely upon them — Magistrate refusing to rely upon such witnesses does not commit any error of law. (Para 12)

Cases Referred: Chronological Paras
(1965) AIR 1965 Pat 411 (V 52) =
1965 (2) Cri LJ 527, State of
Bihar v Hari Mishra

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IM/JM/E79/69/GGM/P.

1970 Cri. L. J. 81.

A. K. Roy, for Petitioners; Ram Saroop Sinha and B. N. Chatterji, for Opposite Parties.

ORDER:— The petitioners were the first party in a proceeding under S. 145 of the Code of Criminal Procedure with respect to several plots of land appertaining to Khata numbers 44, 121 and 137 and situated in village Makhdumpur, Police station Bihta, district Patna. They are aggrieved by the final order passed by the learned Magistrate declaring the second party in possession over the disputed lands.

2. It is common ground that there were two brothers Triloki and Sheo Lochan. Triloki had a son, Kuar Singh who died leaving behind his widow Askueri Kuer. Kuar Singh had a son, Sundar Singh who died leaving behind his widow Dularo Kuer, opposite party no. 6. In the other branch, Hathi Ram was son of Sheo Lochan. Mithila Saran Singh, petitioner no. 1, is the son of Hathi Ram and Rajeshwar Singh, petitioner no. 2, is the surviving son of Mithila Saran Singh who had another son, Mahanand Singh who is dead. The parties are at variance with respect to the family of Rainu Singh. According to the first party, Rainu Singh was full brother of Hathi Ram (father of petitioner no. 1). But according to the second party, Rainu Singh was not the second son of Sheo Lochan but the second son of Triloki. Both the parties, however, are agreed that Rainu Singh had a daughter, Piyari Kuer, whose husband Nihora Singh is opposite party no. 1 in this Court. Opposite party no. 5, Sheo Prasad Singh, is son of Nihora Singh, Opposite party no. 1.

3. It is also undisputed in this case that Nihora Singh, opposite party no. 1, and Dwarka Singh, opposite party no. 2, are full brothers. The case of the second party is that Kuar Singh had also left behind a daughter, named, Balo Kuer and this Balo Kuer was married to Dwarka Singh, opposite party no. 2. According to the case of the first party, however, Kuar Singh had left behind no such daughter. There is, however, no dispute that Upendra Singh and Bhupendra Singh, opposite party numbers 3 and 4 respectively, are sons of Dwarka Singh, Opposite party no. 2.

4. Briefly stated the case of the first party petitioners was that after the death of Sundar Singh, there was no male member to assist the two ladies, Askueri Kuer and Dularo Kuer (opposite Party no. 6) in management of the lands left behind by Sundar Singh. Accordingly Mithila Saran Singh, petitioner no. 1, began to manage their properties and was virtually in possession over the disputed lands. However, on the 7th December, 1961, Dularo Kuer, Opposite

party no 6, executed a deed of gift in respect of the entire disputed lands in favour of the two sons of Mithila Saran Singh, namely, Rajeshwar (Petitioner no. 1) and Mahanand (since deceased). Thus, the members of the first party were in actual possession over the entire disputed lands at the time when the present proceeding was drawn up under the orders of the court, dated the 31st March, 1962.

5. The case of the second party was that Sundar Singh had predeceased his father Kuar Singh, and having none to assist him in his old age to manage his properties, he kept his son-in-law, Dwarka Singh, opposite party no. 2, with himself and thus, it was Dwarka Singh who was in possession over the lands of Kuar Singh. Kuar Singh had also surrendered his properties in favour of Dwarka Singh. Dwarka Singh, used to maintain Askueri Kuer and Dularo Kuer out of the income of the lands of Kuar Singh over which he was in possession. Somehow or the other, Dularo Kuer, opposite party no. 6 was brought in collusion of the first party who took a deed of gift from her on the 7th December, 1961 and raised a dispute as to possession, ultimately giving rise to the present proceeding.

6. It is hardly necessary to add that the learned enquiring Magistrate has accepted the claim of possession over the disputed property put forward by the second party.

7. Mr. A. K. Roy, appearing on behalf of the petitioners, has put forward the contention that the decision of the learned Magistrate is without jurisdiction and, as such, it cannot be sustained. Learned counsel pointed out that by an order, passed on the 30th December, 1963, the enquiring Magistrate had made a reference to the civil Court under Section 146 (1) of the Code of Criminal Procedure, but the civil Court by its order, dated the 22nd February, 1964, returned the records of the case to the Magistrate as the order of reference was not in accordance with law. After that, the Magistrate instead of rectifying the defect in the order of reference to the civil Court took upon himself the responsibility of deciding the proceeding. This, according to Mr. Roy, the Magistrate was not empowered to do. The argument is that on receipt of the records from the civil Court in February, 1964, the only course open to the learned Magistrate was to make a proper reference in the light of the observations contained in the order of the civil Court, dated the 22nd February, 1964. To illustrate his point, Mr. Roy has drawn my attention to a Bench decision of this Court in *State of Bihar v. Hari Mishra*, AIR 1965 Patna 411 to which I was a party.

8. To appreciate the contention of Mr.

Roy, it is necessary to keep in mind the precise circumstances under which the records were returned by the Civil Court under its order, dated the 22nd February, 1964. The order of the enquiring Magistrate, dated the 30th December, 1963 was in the following terms:

"I have gone through the record. The possession of none has so far been found and it requires further enquiry which cannot be decided under section 145 Cr. P. C. As such the proceedings are converted to one under section 146 Cr. P. C. and a reference is made to competent civil court for deciding the claim according to law. Lands are attached under section 146. Send the record to Registrar, Civil Court for needful. Parties to appear before Registrar, Civil Court on 1-2-64."

In the very next order, which is to be found in the order-sheet, the learned Munsif, 3rd Court, Patna, pointed out that the reference to the Civil Court had not been validly made inasmuch as the Magistrate had not drawn up a statement of the facts of the case and the order, dated the 30th December, 1963 also did not show what evidence, oral or documentary, on the point of possession had been produced before the Magistrate. The learned Munsif emphasised that it was the duty of the Magistrate to draw up a statement of the facts of the cases of the parties and to deal with the evidence adduced by them in support of their respective cases so that the Civil Court might be in a position to apply its mind to the reference in question. The learned Munsif concluded his order, dated the 22nd February, 1964, by observing as follows:

"... If the Act provides that a certain thing has to be done in a certain way, that thing must be done in that very way or it should not be done at all. As the law stands, a reference without drawing up statement of the facts of the case is incomplete and improper.

Therefore I have no option but to send back the record of the case to the learned Magistrate concerned who would proceed in accordance with law."

The point raised by Mr. Roy will have to be decided in the light of the effect of the order of the learned Munsif, dated the 22nd February, 1964. Mr. Roy contends that the direction of the learned Munsif was that the Magistrate should act in accordance with law by complying with the requirements of sub-section (1) of section 146 of the Code of Criminal Procedure relating to making a reference of the matter to the Civil Court. In support of his contention, Mr. Roy urged that the earlier order of the learned Magistrate, dated the 30th December, 1963 was not incompetent but merely im-

proper and all that he was called upon to do by the order of the Civil Court was to remove the defect in the referring order so that the reference might become a proper reference in the eye of law. The fallacy in the contention of Mr. Roy is that the Civil Court had no jurisdiction to make any direction to the learned Magistrate. The civil Court was not sitting in appeal over the Magistrate dealing with the proceeding.

9. As pointed out in the Bench decision relied upon by Mr. Roy, "the Civil Court, not being a court of appeal of the Magistrate's court, is not competent and has no jurisdiction to decide the propriety of any reference made by a magistrate under section 146 (1) of the Code of Criminal Procedure. The question whether such a reference by the Magistrate is proper or improper has to be decided by a higher Court, having necessary jurisdiction. The learned Munsif, therefore, adopted the right course to have brought this matter to the notice of the court although there is no provision in the Code of Criminal Procedure for making of any reference by a Munsif. . . Although the civil Court is not competent to decide about the competence or otherwise of any reference by a judicial pronouncement, it can nevertheless bring to the notice of the Magistrate its opinion about the incompetent nature of the reference by means of a letter and the Magistrate may recall such a reference, if he accepts the Munsif's opinion. Such a course will save time and also the parties from unnecessary harassment in coming to the High Court."

It will thus appear that the civil Court in the present case purported to follow the second course indicated in the Bench decision aforesaid. In that very decision, it has been pointed out that the reference of the kind made in the present case was not merely irregular but incompetent and that if in such circumstances the civil Court would have proceeded to give its decision on the question of possession then that would have been without jurisdiction. In other words, in the present case, there was no valid reference to the civil Court at all so as to have clothed it with jurisdiction to give its finding on the question of possession. In the absence of jurisdiction having been conferred upon the civil Court in accordance with law, the learned Munsif could neither record his finding nor make any direction to the learned Magistrate as to what course he should adopt after the return of the records from the civil Court.

To put it differently, the purported reference to the civil Court made under the order of the 30th December, 1963 was abortive and it wholly failed to deprive the learned Magistrate of his normal

jurisdiction to decide the proceeding in accordance with section 145 (4), Criminal Procedure Code and to transfer that jurisdiction to the civil Court under section 146 (1) of the Code. It is also well known that the primary jurisdiction in such matters is that of the Magistrate. That is why, even after the civil Court returns its finding to the Magistrate, it is the duty of the Magistrate to pass the final order in the proceeding in the light of the decision of the civil Court. Therefore, since the order of the 30th December, 1963 could not validly confer any jurisdiction on the civil Court to record its decision, the conclusion must inevitably be that the jurisdiction over the proceeding continued in the Magistrate as before. Therefore, after the receipt of the record from the civil court, it was for the Magistrate to decide as to what course he ought to adopt, whether to make a proper reference to the civil Court under section 146 (1) of the Code or to proceed under section 145 (4).

10. I am unable to accept the contention that by reason of the order of the Civil Court, the Magistrate was left with no option but to make a valid reference under section 146 (1) of the Code. I am, therefore, clearly of the opinion that the Bench decision of this Court, relied upon by Mr. Roy, is really of no avail to him, and in any event, the final order made by the learned Magistrate cannot be struck down as 'without jurisdiction' on the ground urged by Mr. Roy.

11. The next contention of Mr. Roy is that the decision of the learned Magistrate is vitiated on account of failure to consider two of the documents filed before him on behalf of the petitioners, namely, (i) original summons or Mosanna in the name of Mithila Saran Singh in case no. 480 of 1938 and (ii) certified copy of deposition of Moti Singh, dated the 18th August, 1948 in title suit no. 9/3 of 1947-48. As regards item no (i), the contention of Mr. Roy is not correct since the learned Magistrate had made reference to it at page 9 of the certified copy of his judgment. Mr. Roy has rightly contended that the deposition of Moti Singh in title suit no. 9/3 of 1947-48 has not been considered by the learned Magistrate. On looking into the deposition, however, I do not find anything there which could be relevant for deciding the question of possession in the present proceeding. The non-consideration of this document, therefore, is of no consequence at all. This branch of Mr. Roy's argument accordingly fails.

12. Mr. Roy has then made a grievance of the treatment of the affidavits of the witnesses of the petitioners made by the learned Magistrate. Mr. Roy contended that the first party had filed

eight such affidavits and not seven as shown in the impugned order. The affidavit said to have been left out of consideration is said to be of one Kapildeo Singh and that is said to be relevant with respect to two of the disputed plots, 241 and 643. Mr. Ram Saroop Sinha appearing for the other side stated that there was no such affidavit on record. Thereupon a search for the alleged affidavit of Kapildeo Singh was made by Mr. Roy, but it was nowhere to be found on the records of the case. Evidently, no such affidavit was before the learned Magistrate requiring his consideration. Mr. Roy then contended that the learned Magistrate could have no justification for not relying upon the affidavits of four of the witnesses of the first party, namely, Brahmadeo Singh, Baikunth Singh, Mithla Singh and Havildar Singh, when he had himself found that they held lands on the boundaries of the disputed plots 22, 1046 and 1054. This argument does not appeal to me at all. The learned Magistrate was not bound to rely upon these witnesses merely because they appeared to be competent to speak about the possession of the petitioners over the three disputed plots. The learned Magistrate had to decide whether they were truthful witnesses and not merely competent witnesses. The reason is that a competent witness is not necessarily a truthful witness. No error of law can be said to have arisen merely because the learned Magistrate did not feel impressed with the evidence given on affidavits on behalf of the first party.

13. Lastly, Mr. Roy pointed out that Dwarka Singh did not swear any affidavit in this case although he was vitally interested in the dispute. But, it is to be remembered that Dwarka Singh is opposite party no. 2 in this Court and his brother, Nihora Singh (opposite party no. 1) did swear an affidavit in support of the case of the second party in the court below. It was not essential for each and every member of the second party to swear an affidavit in the proceeding. Nothing material, therefore, turns upon the circumstance that Dwarka Singh did not swear any affidavit in the proceeding.

14. In my opinion, no ground has been made out for interfering with the decision of the learned Magistrate. The application fails and is, accordingly, dismissed.

Petition dismissed

1970 CRI L. J. 484 (Vol. 76, C. N. 113)=

AIR 1970 PATNA 102 (V 57 C 15)

M. P. VERMA, J.

Mahendra Prasad Singh and others, Petitioners v. State of Bihar and another, Opposite Party.

Criminal Misc. No. 1742 of 1968, D/- 7-2-1969.

(A) Penal Code (1860), S. 379 — Magistrate making a prohibitory order in a proceeding under S. 144 Criminal P. C.— One party violating the order and harvesting the crop — Opposite party complaining to the Magistrate about theft — Held, charge of theft would not lie — (Criminal P. C. (1898), Ss. 144 & 145).

A prohibitory order was issued by a Magistrate in a proceeding under S. 144 Criminal P. C. in respect of land in dispute restraining both the parties from going upon it. One party against the order entered upon the land and harvested the crops. The other party filed a complaint of theft. The Magistrate took cognizance of the complaint.

Held, (1) that the complainant could not be said to be in possession of the land in view of the prohibitory order and therefore the charge of theft was not maintainable (Para 3)

and (2) that there was not much distinction in the language of the provision under Ss 144 and 145 of Criminal P. C. in the matter of prohibitory order. When a particular party was restrained from enjoying possession of the land, he must be taken to be out of possession for that period. AIR 1949 Cal 632 Foll.

(Para 3)

(Note:— Contrary view is taken in a case reported in 1963 B. L. J. R. 211 but it seems the case was not cited at the Bar — Ed.)

(B) Criminal P. C. (1898), Ss. 144, 145 and 195 (1) (a) — Prohibitory order under S. 144 or 145 — Violation of — Magistrate to prefer complaint under S. 188 Penal Code — Cognizance by himself not possible — (Penal Code (1860), S. 188).

A violation of the prohibitory order passed under S. 144 or 145 of Criminal P. C. cannot be taken cognizance of by the Magistrate who passed it. He has to prefer a complaint about it under S. 188, Penal Code, as provided for under S. 195 (1) (a) of Criminal P. C. Cri. Revn. No. 398 of 1967 (Pat), Rel. on (Para 3)

Cases Referred: Chronological Paras (1967) Cri. Revn. No. 398 of 1967 (Pat)

(1949) AIR 1949 Cal 632 (V 36)=

51 Cri. LJ 97, Osman Mistry v.

Atul Krishna Ghosh

Lala Kailash Bihari Prasad, for State; Brajeshwar Prasad Sinha and Bhupendra Nath Sinha, for Petitioners; S. Anwar Ahmad, for Private Party.

ORDER: This petition has been filed against the order of the learned Sub-divisional Magistrate, dated the 10th September, 1968, by which he ousted the jurisdiction of the Gram Cutcherry and himself took cognizance of an offence under section 379 of the Indian Penal Code. The short facts leading to this petition may be summarised as under:

2. The complainant filed a petition of complaint before the Sarpanch of the Gram Cutcherry on the 14th September, 1966, alleging that these petitioners had forcibly cut away and removed Marua crops from some plots of Khata No. 233, situate in village Dihura, within the jurisdiction of Tikari police-station in the district of Gaya. The Sarpanch got the matter enquired into by the Mukhiya of the Gram Panchayat. After receipt of that report, the Sarpanch sent the petition of complaint to the Sub-divisional Magistrate, Gaya. The learned Sub-divisional Magistrate then took cognizance under sections 147 and 379 of the Indian Penal Code, and transferred the case to the file of a Munsif-Magistrate for trial. As against that order of taking cognizance, these very petitioners had come up to this Court with the allegation that the lands in question were the subject-matter of a proceeding under S. 144 of the Code of Criminal Procedure, and both the parties had been restrained from going upon the lands. The alleged cutting of the Marua crop by as many as 28 persons was alleged to have been done within the period of 60 days from the date of issue of the prohibitory order under section 144 of the Code of Criminal Procedure. That matter was heard by this very Court in Criminal Revn. No. 398 of 1967 (Pat) and two observations were made. The first was that, "if the learned Sub-divisional Magistrate wants to oust the jurisdiction of the Gram Cutcherry and direct that this case should be tried by a regular magistrate, he can do so after giving sufficient reasons for the same." The second observation made was that in a case of this nature, where there had been violation of his prohibitory order, the learned Sub-divisional Magistrate should not have taken cognizance himself, but should have made a complaint against the alleged wrongdoers under section 188 of the Indian Penal Code. As laid down under section 195 (1) (a) of the Code of Criminal Procedure, no Court could take cognizance of an offence like this, except on the complaint in writing of the public

servant concerned, or of some other public servant to whom he is subordinate.

3. The main point which has been argued before me is that at the time of the harvesting of the Marua crops, the complainant could not be said to be in possession of the property, as he as well as these accused persons had been restrained from going upon the land. Learned State lawyer has tried to make a distinction between the provisions of Section 144 and Section 145 of the Code of Criminal Procedure as regarding the nature of custodia legis concerning the property involved in the proceeding. According to him, under Section 145 (4) of the Code of Criminal Procedure, an attachment is effected and then only the property comes into the custody of the Court or the Magistrate; whereas under Section 144 of the Code, the possession still remains with the complainant, though he is asked not to go upon the land. In my opinion, there is not much distinction between the language used in Sections 144 and 145. When a particular party is restrained from enjoying the possession of the land, he must be taken to be out of possession for that period.

This view of mine finds support from a decision of the Calcutta High Court in *Osman Mistry v. Atul Krishna Ghosh*, AIR 1949 Cal 632. The facts of that case appear to be on all fours with the facts of the case in hand. There paddy had been harvested while a prohibitory order under section 144 of the Code of Criminal Procedure was in force. It was pointed out in that case that a charge of theft could not lie inasmuch as the paddy was then not in possession of the opposite parties by reason of the fact that there was an order under section 144 of the Code of Criminal Procedure prohibiting both parties from going on the land and exercising acts of possession thereon; and it was held that "At the time of the alleged cutting of the paddy, therefore, it cannot be said that it was in the possession of the opposite parties. An offence of theft cannot be committed unless the property is moved out of possession of a person. On this ground also the charge of theft would not be maintainable." Nothing has been shown to me against this view, or the view I had taken in the previous case. I would, therefore, once again draw the attention of the learned Sub-divisional Magistrate to the legal position obtaining in this case. If he thinks that his order has been violated and injustice has been done to the complainant, he may file a complaint according to the legal procedure. He himself could not take cognizance in a case like this, and so his order of taking cognizance is quashed.

4. In the result, this petition succeeds and the impugned order of the learned Magistrate is quashed

Petition dismissed.

1970 CRI. L. J. 486 (Vol. 76, C. N. 114) =

AIR 1970 RAJASTHAN 60 (V 57 C 11)

D. M. BHANDARI C. J. AND

S. N. MODI, J.

Ram Kumar, Appellant v. State of Rajasthan, Respondent.

Criminal Appeal No. 685 of 1966, D/-23-4-1969, against judgment of Sessions J. Kota D/28-9-1966.

(A) Evidence Act (1872), S. 32 — Dying declaration — Reliability — To pass the test of reliability dying declaration has to be subjected to very close scrutiny — Once the Court has come to conclusion that it was true, there is no question of further corroboration. AIR 1958 SC 22, Rel. on.

(Para 8)

(B) Penal Code (1860), S. 300 — Intention and knowledge — Difference between — Knowledge is awareness of consequences — Intention requires something more than mere awareness of consequences.

The framers of the Code designedly used the words "intention" and "knowledge" in Section 300. They intended to draw a distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where *mens rea* is not required in order to prove that a person had certain knowledge he must have been aware that certain specified harmful consequences would or could follow. This awareness is termed as knowledge. But if an act is done by a man with the knowledge that certain consequences may follow or will follow, it does not necessarily mean that he intended such consequences and acted with such intention. Intention requires something more than a mere foresight of the consequences. It requires a purposeful doing of a thing to achieve a particular end. (Para 10)

The noun "intention" denotes the state of mind of a man who not only foresees but also desires the possible consequences of his conduct. (Para 10)

For holding an offence of culpable homicide proved, it is necessary that specific intention must be proved. But even when such intention is not proved, the offence will be culpable homicide if the doer of the act causes the death with the knowledge that he is likely by his such act to cause death. (Para 12)

(C) Penal Code (1860), S. 300 — Intention — Proof of — No presumption — Burden to prove intention — Extent of, stated — (Evidence Act (1872), Ss. 101-104 and 114).

It is not correct to say that the intention of an accused is a subjective state of mind which cannot be positively proved in every case except by the accused himself stating either in evidence or in his explanation that such and such was his intention when he performed the act and that unless such an explanation is forthcoming from the accused and accepted by the Court, he must be presumed to intend the natural consequences of his act. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. The burden to prove intention is on prosecution. In one way Section 300 I. P. C. makes the presumption that a person intends the natural and probable consequence of his act irrebuttable to the extent that if it is proved that the particular injury intended to be inflicted by the accused turned out objectively to be sufficient in the ordinary course of nature to cause death, the accused cannot plead that he had not the intention of causing a bodily injury sufficient in the ordinary course of nature to cause death. The subjective test is confined to proving that the accused intended to cause such bodily injury as was likely to cause death and it is not necessary that it must further be proved by the prosecution that the accused intended to inflict bodily injury sufficient in the ordinary course of nature to cause death. It is sufficient if it is proved that the particular bodily injury was sufficient in the ordinary course of nature to cause death for holding the accused guilty for the offence of murder. AIR 1962 SC 605 and AIR 1964 SC 1563, Rel. on; AIR 1966 SC 1 and AIR 1961 AC 290, Expl.

(Para 20)

(D) Penal Code (1860), Ss. 299, 300 and 304 Part 2 — Intention — Absence of — Defence of accident under intoxication of liquor — Plea not raised specifically — Court can still take into consideration circumstances of case.

In spite of the fact that the accused has not taken any definite plea of accident and that he has not explained why he fired the gun at the deceased, the Court may minutely examine all the circumstances on record and see whether the facts and circumstances pointed out that the appellant must have intended to cause the death or to cause such bodily injury as was likely to cause death. Case law reviewed. (Para 22)

The appellant and the deceased together had gone for a picnic and were engaged in merry-making. They drank liquor and took their meals. The appellant had not taken any weapon with him but a gun was used by another for shooting at sparrows before the incident. No motive or enmity between the appellant and the deceased was proved. The shooting was performed in broad day light without any attempt to hide it and was consistent with the fact that the appellant may have tried to handle the loaded gun recklessly.

Held that no inference could be drawn that the appellant had either the intention of

killing the deceased or that he had the intention of causing him such bodily injury as was likely to cause his death. (Para 23)

However, there was no room for doubt that the appellant must have had the knowledge that he was doing an act which was likely to cause the death. He could, therefore, be convicted under Sec. 304 Part 2 instead of under S. 302 I. P. C.

(Paras 24, 25)

Cases Referred : Chronological Paras

(1968) AIR 1968 SC 867 (V 55) =

1968 Cri LJ 1023, Harjinder Singh v. Delhi Administration 20

(1966) AIR 1966 SC 1 (V 53) =

1966 Cri LJ 63, Bhikari v. State of Uttar Pradesh 17

(1966) AIR 1966 SC 148 (V 53) =

1966 Cri LJ 171, Anda v. State of Rajasthan 20

(1964) AIR 1964 SC 1563 (V 51) =

1964 (2) Cri LJ 472, Dahyabhai v. State of Gujarat 16

(1962) AIR 1962 SC 605 (V 49) =

(1962) 1 Cri LJ 521, K. M. Nanawati v. State of Maharashtra 15

(1961) 1961 AC 290 = 1960-3 WLR

546, Director of Public Prosecutions v. Smith 18

(1958) AIR 1958 SC 22 (V 45) =

1958 Cri LJ 106, Khushal Rao v. State of Bombay 8

(1958) AIR 1958 SC 465 (V 45) =

1958 Cri LJ 818, Virsa Singh v. State of Punjab 20

(1942) 1942 AC 1 = 111 LJ KB 84,

Maneini v. Director of Public Prosecutions 21

(1935) 1935 AC 462 = 104 LJ KB

433, Woolmington v. Director of Public Prosecutions 14, 15

(1915) 1915-2 KB 431 = 84 LJ KB

1371, Rex v. Hopper 21

O. C. Chatterji, for Appellant; B. C. Chatterji, Addl. Govt. Advocate, for the State of Rajasthan.

BHANDARI C. J.: Ramkumar appellant and Ramsingh were tried by the Sessions Judge, Kota, for causing the murder of Yuvrajsingh. Ramkumar has been convicted for the offence of murder under Section 302 of the Indian Penal Code and sentenced to imprisonment for life, while Ramsingh accused has been acquitted. This appeal has been filed by Ramkumar challenging his conviction.

2. Briefly the prosecution case is that Ramsingh, Ramkumar and Yuvrajsingh went from Kota for a picnic on the morning of 21st November, 1965 to a Talai near village Sakatpur. Ramsingh had a licence for a muzzle loading gun and he carried it with him.

At the Talai they took liquor and then food was prepared by Prabhulal P. W. 10 who also accompanied them and all of them had their lunch. Prabhulal P. W. 10 then left the place with the utensils, leaving Ramsingh, Ramkumar and Yuvraj at the Talai.

At about 4 P. M. one gunshot was fired by Ramkumar appellant and it is alleged that it seriously injured Yuvrajsingh. The two accused thereafter ran away with the gun. Mst. Kishni P. W. 5 was near the Talai with her nephew Kanhaiyalal P. W. 6. On hearing the report of the gun she went to the place where Yuvrajsingh was lying in serious condition. Yuvrajsingh requested Mst. Kishni to take him to the hospital. Soon some other villagers assembled. Kanhaiyalal went to the office of Bundi Silika Company at Kunhari and asked Babu P. W. 9 to telephone the Police that a man had been shot at the Talai. Babu telephoned to the Police Station Bhimganjmandi. Vinod Dhane P. W. 11 Station House Officer received the message at about 4-30 P. M. On this message the first information report was prepared.

In the first information report it is mentioned that the name of the man who had received the gunshot was Yuvrajsingh and that the person who had fired at him was Ramkumar. The name of the other companion was Ram Singh. Vinod Dhane went to the Talai. He found Yuvrajsingh seriously injured on the road at about 150 feet away from the tank. He was taken to the M. B. S. Hospital at Kota. He was examined by Dr. Hukamchand Jain and admitted in the hospital.

The doctor noted in the bed ticket Ex. D. 1 that the person (injured) stated that he had been shot at by his class mate Ramkumar of Genta. Vinod Dhane, the Station House Officer, himself recorded the dying declaration in the presence of Dr. Hukamchand. The dying declaration is Ex. P. 3. The gist of the dying declaration is that Yuvrajsingh, Ramsingh and Ramkumar had gone from Kota to have drinks. They had taken sufficient quantity of liquor which Ramsingh had brought. Ramsingh had also brought a gun for hunting. Ramkumar took the gun from Ramsingh and shot at him at the left hip of Yuvrajsingh. The gun was fired by Ramkumar. It was a double barrel muzzle loading gun. Thereafter both of them ran away with the gun.

3. The injury report shows that the deceased had three pea size gunshot wounds lacerated in nature on the left hypochondrium. They were skin deep and simple. There was one oval gunshot wound in the left hypochondrium 3/4" x 1/2" going into the peritonal cavity and bowels were visible. This last injury was grievous. There was also fracture of the left 10th rib and a tear in the posterior wall of the stomach. Dr. N. K. Sharma performed the operation and removed a pea size stone (shot). Yuvrajsingh, however, did not survive and succumbed to the injuries on 22nd November, 1965. The post-mortem examination on the dead body of Yuvrajsingh was performed by Dr. R. K. Gupta. The cause of death was perforation of stomach leading to peritonitis and shock.

4. Vinod Dhane arrested the accused

Ramsingh and Ramkumar and recovered a gun from Ramsingh.

5. Both the accused were challaned before the Additional Munsif Magistrate First Class, Court No. 2, Kota who committed them for trial to the Sessions Judge, Kota. The accused denied to have committed the offence. Ramkumar in his statement under Section 342 Criminal P. C stated that they had gone to the Talai at village Sakatpur for a picnic party Yuvrajsingh forced him to take liquor and he became drunk. Thereafter he did not know what happened. Two defence witnesses were produced to show that Ramkumar did not take liquor.

The learned Sessions Judge held that the deceased had made a dying declaration to Dr. Hukamchand Jain which was recorded in Ex. D. 1, that he made another dying declaration to the investigating officer in the presence of the said doctor and that was recorded in Ex. P. 3 and both these dying declarations were proved by their evidence. The learned Sessions Judge found corroboration of these dying declarations from the other circumstances brought on record. He held that Ramkumar had shot Yuvrajsingh and Yuvrajsingh died on account of the gunshot injuries thus inflicted. He disbelieved the case put forward by the accused that he was made to drink forcibly and rejected the argument of the learned counsel for the defence that the accused Ramkumar was entitled to protection under Section 85 of the Indian Penal Code. Ramkumar was convicted under Section 302 of the Indian Penal Code and sentenced to imprisonment for life.

6. In this appeal, learned counsel for the appellant has challenged the dying declarations mainly on the ground that the dying declarations made at the hospital were not in conformity with the dying declaration made by the deceased to Kanhaiyalal P. W. 6 and Mst. Kishni P. W. 5 as before these witnesses the deceased had named Ramsingh and Ramkumar as his assailants. Kanhaiyalal has no doubt stated that Yuvrajsingh had named Ramsingh and Ramkumar as the persons who had shot at him. He admitted in cross-examination that he had no talk with the injured, that it was his maternal aunt who had a talk with injured person and that on her enquiry, the injured had named Ramsingh and Ramkumar. He further stated that his maternal aunt had a talk with the injured person in his presence. He was standing about 15 paces away from the injured.

Mst. Kishni P. W. 5 has stated that on enquiry the deceased told her that he was a resident of Genta and his name was Yuvrajsingh and the deceased had named Ramsingh and Ramkumar as the two persons who had come there. She did not state that the deceased had named Ramsingh and Ramkumar as his assailants. Kanhaiyalal has also stated that he had conveyed on the telephone the names of Ramsingh and Ramkumar as the assailants of the victim. Learned coun-

sel has also relied on the statement of Babu P. W. 9 that he was informed by Yuvraj Singh when he was lying at the Talai where the witness went with the police that Ramsingh and Ramkumar and some other persons had shot him.

7. In our opinion, the trial Court has rightly held that the two dying declarations one contained in Ex. D. 1 and the other in Ex. P. 3 were made by the deceased when he was fully conscious and that they were consistent with each other and were not in any way in conflict with any other statement made by the deceased. Babu P. W. 9 has made a statement which was very vague. Kanhaiya Lal P. W. 6 had not himself interrogated the deceased and he merely stated what the deceased is said to have stated to Mst. Kishni in his presence. Mst. Kishni has not stated that Yuvrajsingh had named both the accused as his assailants. The evidence of these witnesses does not cast any doubt on the dying declarations Ex. D. 1 and Ex. P. 3.

8. Learned counsel for the appellant has argued that the appellant could not be convicted solely on the basis of these dying declarations. The law on the subject has been laid down by their Lordships of the Supreme Court in Khushal Rao v. State of Bombay, AIR 1958 SC 22 (29) in the following passage:

"Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration."

9. The circumstances of the case show that Ramkumar and Ramsingh were both present near Yuvrajsingh at the time of the incident, and there is no reason whatsoever for Yuvrajsingh to falsely implicate his classmate Ramkumar. Yuvrajsingh had also sufficient opportunity to see who had fired the gun. He has given consistently the name of Ramkumar as his assailant in his dying declarations. In Ex. P. 3 he has amplified that Ramkumar had taken the gun from Ramsingh and had shot at him and that it was Ramkumar who had actually fired the gun. In our opinion, the dying declarations made by Yuvrajsingh were true. On the strength of these dying declarations it is proved beyond any manner of doubt that it was Ramkumar appellant who had fired the gun at Yuvrajsingh.

10. The important question which has engaged our careful attention in this case is whether on the facts and in the circumstances of this case, we should maintain the conviction of the appellant for the offence of murder. The Indian Penal Code defines in Section 299 the offence of culpable homi-

eide. Under this section it is to be proved that an accused has caused death of any person by an act and that act was done (1) with the intention of causing death or (2) with the intention of causing such bodily injury as is likely to cause death or (3) with the knowledge that he is likely by such act to cause death. Section 300 of the Code lays down that except in cases falling within the exceptions mentioned in that section, culpable homicide must be murder if the act by which the death is caused is done with the intention or knowledge as specified in that section.

Thus while defining the offence of culpable homicide and murder, the framers of the Code laid down that requisite intention or knowledge must be imputed to the accused when he committed the act which caused the death in order to hold him guilty for the offence of culpable homicide or murder as the case may be. The framers of the Code designedly used the two words "intention" and "knowledge", and it must be taken that the framers intended to draw a distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where mens rea is not required in order to prove that a person had certain knowledge, he "must have been aware that certain specified harmful consequences would or could follow." (Russell on Crime, Twelfth Edition Volume 1 page 40).

This awareness is termed as knowledge. But the knowledge that specified consequences would result or could result by doing an act is not the same thing as the intention that such consequences should ensue. If an act is done by a man with the knowledge that certain consequences may follow or will follow, it does not necessarily mean that he intended such consequences and acted with such intention. Intention requires something more than a mere foresight of the consequences. It requires a purposeful doing of a thing to achieve a particular end. This we may make it clear by referring to two passages from leading text-books on the subject. Kenny in his *Outlines of Criminal Law*, 17th Edition at Page 31 has observed:

"To intend is to have in mind a fixed purpose to reach a desired objective, the noun 'intention' in the present connexion is used to denote the state of mind of a man who not only foresees but also desires the possible consequences of his conduct It will be noted that there cannot be intention unless there is also foresight, since a man must decide to his own satisfaction, and accordingly must foresee, that to which his express purpose is directed . . . Again, a man cannot intend to do a thing unless he desires to do it."

11. Russell on Crime, Twelfth Edition Vol. 1st page 41 has observed:

"In the present analysis of the mental ele-

ment in crime the word "intention" is used to denote the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so. He shapes his line of conduct so as to achieve a particular end at which he aims.

Differing from intention, yet closely resembling it, there are two other attitudes of mind, either of which is sufficient to attract legal sanctions for harm resulting from action taken in obedience to its stimulus, but both of which can be denoted by the word "recklessness". In each of these the man adopts a line of conduct with the intention of thereby attaining an end which he does desire, but at the same time realises that this conduct may also produce another result which he does not desire. In this case he acts with full knowledge that he is taking the chance that this secondary result will follow. Here, again, if this secondary result is one forbidden by law, then he will be criminally responsible for it if it occurs. His precise mental attitude will be one of two kinds—(a) he would prefer that the harmful result should not occur, or (b) he is indifferent as to whether it does or does not occur."

12. The phraseology of Sections 299 and 300 of the Code leaves no manner of doubt that under these sections when it is said that a particular act in order to be punishable be done with such and such intention, the requisite intention must be proved by the prosecution. It must be proved that the accused aimed or desired that his act should lead to such and such consequences. For example, when under Section 299 it is said "whoever causes death by doing an act with the intention of causing death," it must be proved that the accused by doing the act, intended to bring about the particular consequences, that is, causing of death. Similarly, when it is said that "whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death," it must be proved that the accused had the aim of causing such bodily injury as was likely to cause death.

Thus, in order that the requirements of law with regard to intention may be satisfied for holding an offence of culpable homicide proved, it is necessary that any of the two specific intentions must be proved. But even when such intention is not proved, the offence will be culpable homicide if the doer of the act causes the death with the knowledge that he is likely by his such act to cause death, that is, with the knowledge that the result of his doing his act may be such as may result in death.

13. Learned Additional Government Advocate has laid much stress on the point that the intention of an accused is a subjective state of mind which cannot be positively proved in every case except by the accused himself stating either in evidence or in his explanation that such and such was his intention when he performed the act and that

unless such an explanation is forthcoming from the accused and accepted by the Court, he must be presumed to intend the natural consequences of his act. He has relied on several cases on this point. But this maxim is not a substantive principle of law. It is only a maxim of great evidentiary value. In this connection, we may refer to the following passage from Glanville L. Williams, 1953 Edition, Article 27, page 81:

"It is now generally agreed, in conformity with this opinion, that the maxim does not represent a fixed principle of law, and that there is no equiparation between probability and intent. This was pointed out by Stephen, although his words for some time had little effect upon the language used by judges. Recently Denning L. J. said: 'there is no 'must' about it; it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense."

14. In the same book (Article 227) while discussing the burden of proof in homicide the learned author has observed:

"Foster stated that every killing was presumed to be murder until the contrary was shown, and this statement was unintelligently copied from one textbook to another although it was contrary to the fundamental presumption of innocence. The heresy was extirpated by the House of Lords in Woolmington, 1935 AC 462; which decided that there is no persuasive presumption of murderous malice, and that when a defence to a charge of murder is accident or provocation, the burden of satisfying the jury still rests on the prosecution. Lord Sankey said: 'if the jury are left in reasonable doubt whether the act was unintentional or provoked, the prisoner is entitled to be acquitted, i. e. of murder.'"

15. The Supreme Court referred to Woolmington's case, 1935 AC 462 in K. M. Nanawati v State of Maharashtra, AIR 1962 SC 605, and observed as follows:

"As in England so in India, the prosecution must prove the guilt of the accused, i. e. it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution, and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt."

16. Another case is Dahyabhai v. State of Gujarat, AIR 1964 SC 1563. It was a case in which the plea of insanity was under consideration. It was observed:

"It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite 'intention' described in Section 299 of the

Penal Code. The general burden never shifts and it always rests on the prosecution."

17. Learned Additional Government Advocate has relied on the following observations of their Lordships of the Supreme Court in Bhikari v. State of Uttar Pradesh, AIR 1966 SC 1 (2):

"There is no doubt that the burden of proving an offence is always on the prosecution and that it never shifts. It would, therefore, be correct to say that intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Thus if a person deliberately strikes another with a deadly weapon, which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the quality of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case the prosecution must be deemed to have discharged the burden which rested upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon. Section 84 of the Indian Penal Code can no doubt be invoked by a person for nullifying the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Now it is not for the prosecution to establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law."

But in that very case their Lordships have pointed out that it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and that if upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused, he would be entitled to be acquitted.

18. Learned Additional Government Advocate has further relied on the following observations in Director of Public Prosecutions v. Smith, 1961 AC 290 (331):

"Another criticism of the summing up and one which found favour in the Court of Criminal Appeal concerned the manner in which the trial Judge dealt with the presumption that a man intends the natural and probable consequences of his acts. I will cite the passage again: 'the intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the

natural and probable consequences of his acts." It is said that the reference to this being a presumption of law without explaining that it was rebuttable amounted to a misdirection. Whether the presumption is one of law or of fact or, as has been said, of common sense, matters not for this purpose. The real question is whether the jury should have been told that it was rebuttable. In truth, however, as I see it, this is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. In the present case, therefore, there was no need to explain to the jury that the presumption was rebuttable."

19. This case has been the subject-matter of great controversy and so far as we are concerned, it may be stated that in this very passage it has been mentioned in unmistakable terms that the presumption arising that a man intends the natural and probable consequences of his act is rebuttable. In order to put the law beyond any controversy in England, the Parliament enacted section 8 Criminal Justice Act, 1967 which runs as follows:

"A Court or jury, in determining whether a person has committed an offence,—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but,

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appears proper in the circumstances."

The effect of this new section is that there is no room for doubt to interpret Smith's case in the light that the presumption that a person intends the natural consequences of his act will be irrebuttable. Now, under the English Law, the subjective intent to cause grievous bodily harm must be proved though it may be inferred taking into account the totality of all the circumstances pertaining to the case.

20. Under the Indian law, it has been enacted in Section 300 that "culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." In one way this provision makes the presumption that a person intends the natural and probable consequence of his act irrebuttable to the extent that if it is proved that the particular injury intended to be inflicted by the accused turned out objectively to be sufficient in the ordinary course

of nature to cause death, the accused cannot plead that he had not the intention of causing a bodily injury sufficient in the ordinary course of nature to cause death. The subjective test is confined to proving that the accused intended to cause such bodily injury as was likely to cause death and it is not necessary that it must further be proved by the prosecution that the accused intended to inflict bodily injury sufficient in the ordinary course of nature to cause death. It is sufficient if it is proved that the particular bodily injury was sufficient in the ordinary course of nature to cause death for holding the accused guilty for the offence of murder. This law has been clarified in *Virsa Singh v. State of Punjab*, AIR 1958 SC 465, *Anda v. State of Rajasthan*, AIR 1966 SC 148, and *Harjinder Singh v. Delhi Administration*, AIR 1968 SC 867. Apart from this, there is no difference between the Indian law and English law as clarified by the Criminal Justice Act, 1967, on this point.

21. It is, however, urged before us that at least in the case of gunfire it was for the accused to explain that he was acting without any intention to cause such bodily injury as was likely to cause death and that in the absence of any plea or explanation, the presumption has remained unrebutted. It is further pointed out that in this case Ram Kumar appellant took up the defence that he acted under intoxication of liquor which was forcibly administered to him, and that this defence has been rejected by the trial Court. We accept that the trial Court was right in rejecting this plea. But we are of the view that if the circumstances of the case otherwise show that the prosecution has failed to prove that the accused had the requisite intention required to be proved under Sections 299 and 300 I. P. C. we can rely on those circumstances in spite of the fact that he had not taken that plea or had not offered an explanation suggesting such defence. In this connection we may quote the following passage from the speech of Viscount Simon L. C. in *Mancini v. Director of Public Prosecutions*, 1942 AC 1 (7):

"Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the Judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the Judge from the duty of directing the jury to consider the alternative if there is material before the jury which would justify a direction that they should consider it. Thus, in *Rex v. Hopper*, (1915) 2 KB 431, at a trial for murder the prisoner's

counsel relied substantially on the defence that the killing was accidental, but Lord Reading C. J., in delivering the judgment of the Court of Criminal Appeal, said, "We do not assent to the suggestion that as the defence throughout the trial was accident, the Judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

22. Judged in the light of the aforesaid observations, we are of the view that in spite of the fact that the accused has not taken any definite plea of accident and that he has not explained why he fired the gun at the deceased, we may minutely examine all the circumstances on record and see whether the facts and circumstances pointed out that the appellant must have intended to cause the death of Yuvrajsingh or to cause such bodily injury to him as was likely to cause his death. The circumstances of the case appear to us not to impute such intention to the appellant for the following reasons:

(1) That the appellant Ramkumar and the deceased Yuvrajsingh had gone for a picnic party to the tank at Sakatpur and whatever they did there all shows that they were engaged in merry making. They drank liquor and took their meals.

(2) The appellant had not taken any weapon with him as it is the prosecution evidence that the gun belonged to Ramsingh who had taken it with him.

(3) It is in the evidence of Mst. Kishni that the gun was used by Ramsingh for shooting at sparrows before the incident.

(4) No motive or enmity has been proved by the prosecution which may have actuated the appellant to commit the crime.

(5) The shooting was performed in broad day light without any attempt to hide it and is consistent with the fact that the appellant may have tried to handle the loaded gun recklessly.

23. We are, therefore, not inclined to draw the inference that the appellant had either the intention of killing the deceased or that he had the intention of causing him such bodily injury as was likely to cause his death.

24. Even if we rule out any such intention on the part of the appellant, there is no room for doubt that the appellant must have had the knowledge that he was doing an

act which was likely to cause the death. There can be no doubt that the gun when the appellant took it from Ramsingh was loaded and that he must have had the knowledge that if he pressed the trigger of such a gun aiming in the direction of the deceased, it was likely to cause his death. The distance from which the gun was fired was not more than 5 feet from the deceased according to the medical evidence and even if we do not impute to the appellant the knowledge that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death, yet we must impute to the accused the knowledge that he was doing an act with the knowledge that he was likely by such act to cause death. We are, therefore, of the view that the appellant's conviction under Section 302 of the Indian Penal Code be set aside and he be convicted under Section 304 Part 2 of the Indian Penal Code.

25. We therefore set aside his conviction under Section 302 I. P. C. as also the sentence of imprisonment for life and instead convict him under Section 304 Part 2 of the Indian Penal Code and sentence him to five years' rigorous imprisonment.

Order accordingly.

1970 CRI. L. J. 492 (Vol. 76, C. N. 115) =

AIR 1970 SUPREME COURT 318

(V 57 C 67)

(From Allahabad. AIR 1967 All 491)

S. M. SIKRI, G. K. MITTER

AND K. S. HEGDE, JJ.

Dhian Singh, Appellant v. Municipal Board, Saharanpur and another, Respondents.

Criminal Appeal No. 122 of 1967, D/- 31-7-1969.

(A) Criminal P. C. (1898), Section 417(3)

— Prevention of Food Adulteration Act

(1954), Section 20 — Complaint for offence under the Act purported to have

been filed by Municipal Board but signed

by its Food Inspector — Acquittal —

Municipal Board held competent to file

appeal against acquittal — Municipal

Board was competent to file complaint

or to authorise its Food Inspector on its

behalf.

Where a complaint for an offence under

the Prevention of Food Adulteration Act,

was purported to have been filed by the

Municipal Board but it was signed by

its Food Inspector, the Municipal Board

held, was competent to file appeal, under

Section 417 (3) of Criminal P. C. against

the acquittal of the accused (Para 6)

LM/AN/D995/69/LGC/D

The Municipal Board being a local authority was competent to file complaint in view of Section 20, Prevention of Food Adulteration Act. It was also competent for that Board to authorise some one else to file complaints under the Prevention of Food Adulteration Act on its behalf. It is true that the complaint was signed by the Food Inspector but it was competent for the Municipal Board to authorise him to file the complaint. Criminal Appln. No. 100 of 1966, D/- 27-3-1969 (SC), Relied on. (Paras 4, 5)

(B) Prevention of Food Adulteration Act (1954), Section 13 — Report of Public Analyst — Need not contain mode or particulars of analysis nor the test applied — But should contain result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated — Relevant data given in report — Accused can be convicted on basis of such report. AIR 1964 All 270, Approved. (Para 7)

(C) Constitution of India, Article 136 — Proceedings under Prevention of Food Adulteration Act — Food Inspector's authority to file complaint on behalf of Municipal Board neither challenged before trial court nor before High Court in appeal — Accused cannot be permitted to take up contention for first time before the Supreme Court after disposal of appeal by the High Court. AIR 1966 SC 128, Relied on. (Para 5)

(D) Prevention of Food Adulteration Act (1954), Section 20 — Permission under — No question of applying one's mind to the facts of case before institution of complaint arises — Authority under section can be conferred long before a particular offence takes place.

Under Section 20 no question of applying one's mind to the facts of the case before the institution of the complaint arises as the authority to be conferred under that provision can be conferred long before a particular offence has taken place. It is a conferment of an authority to institute a particular case or even a class of cases. That section merely prescribes that persons or authorities designated in that section are alone competent to file complaints under the statute in question AIR 1948 PC 82 and AIR 1954 SC 637, Disting. (Para 5)

Cases Referred: Chronological Paras

(1969) Cri. App. No. 100 of 1966,
D/- 27-3-1969 (SC), K. C. Agarwal
v. Delhi Administration

(1967) 1967 All WR (HC) 223 =
1967 All Cri R. 172, Dhian Singh
v. Municipal Board, Saharanpur 3
(1966) AIR 1966 SC 128 (V 53) =
1965-2 SCR 894 = 1966 Cri LJ
106, Mangaldas Raghavji v. State
of Maharashtra 5
(1964) AIR 1964 All 270 (V 51) =
1963 All LJ 765, Nagar Maha-
palika of Kanpur v. Sri Ram 7
(1954) AIR 1954 SC 637 (V 41) =
1954 Cri LJ 1656, Madan Mohan
Singh v. State of U. P. 5
(1948) AIR 1948 PC 82 (V 35) =
75 Ind App 30, Gokulchand
Dwarkadas Morarka v. The King 5
M/s. R. K. Garg and S. C. Agarwal,
Advocates of M/s. Ramamurthi and Co.,
and Miss Sumitra Chakravarty and Mr.
Uma Dutt, Advocates, for Appellant; Mr.
O. P. Rana, Advocate, for Respondent No.
2.

The following Judgment of the Court was delivered by

HEGDE, J.: Two contentions advanced in this appeal by special leave are (1) that the appeal filed by the Municipal Board, Saharanpur before the High Court of Allahabad under Section 417 (3) of the Criminal Procedure Code was not maintainable in law, and (2) the accused could not have been convicted on the strength of the certificate of the Public Analyst annexed to the complaint. The High Court rejected both these contentions.

2. The material facts relating to this appeal are these: The accused in this case is the proprietor of Khalsa Tea Stall situated in Court Road, Saharanpur. Among other things, he was selling coloured sweets. On suspicion that the sweets sold by him were adulterated, the Food Inspector, Municipal Board, Saharanpur purchased from the accused for examination some coloured sweets under a Yaddasht on May 31, 1963 and sent a portion of the same to the Public Analyst of the Government of U. P. for examination. The Public Analyst submitted his report on June 24, 1963. It reads:

"See Rule 7 (3)

Report By The Public Analyst

Report No. 11652

I hereby certify that I, Dr. R. S. Srivastava, Public Analyst for Uttar Pradesh, duly appointed under the provisions of the Prevention of Food Adulteration Act, 1954, received on the 4th day of June, 1963, from the Food Inspector C/o Medical Officer of Health, Municipal Board, Saharanpur, a sample of coloured sweet

(Patisa) prepared in Vanaspati No. 264 for analysis, properly sealed and fastened and that I found the seal intact and unbroken.

I, further certify that I have caused to be analysed the aforementioned sample, and declare the result of the analysis to be as follows:—

Test for the presence of coal-tar dye:—
Positive.

Coal-tar dye identified:—Metanil yellow. (Colour Index No. 138).

Analytical Data In Respect of
Fat Or Oil Used In The Preparation of the Sample

1. Bltyro—refractometer reading at 40°C:— 50.5.

2. Melting point :— 33.8°C.

3. Baudouin's test for the presence of Til oil:—Positive.

4. Tintometer reading on Lovibond Scale 4.0 Red Units plus 0.1 yellow unit coloured with a coal-tar dye namely, Metanil Yellow (Colour Index No. 138) which is not one of the coal-tar dyes permitted for use in food-stuffs under rule No. 28 of the Prevention of Food Adulteration Rules, 1955.

No change had taken place in the constituents of the sample which would have interfered with analysis.

Signed this 24th day of June, 1963.

The sample belongs to:—

S. Dhian Singh s/o
Jiwan Singh.

R. S. Srivastava,
M.Sc., LLB. Ph.D (Lond.),
P.R.L.C.,
Public Analyst to Govt.
of U. P.
Public Analyst,
Uttar Pradesh,
Lucknow.

Sender's address:

The Food Inspector, C/o Medical Officer of Health, Municipal Board, Saharanpur."

3. On the basis of that certificate, a complaint was filed in the Court of City Magistrate, Saharanpur under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954. It is purported to have been filed by the Municipal Board, Saharanpur but it was signed by its Food Inspector. The accused pleaded not guilty. Various contentions were taken by the accused in support of his defence. The trial court acquitted him taking the view that as the report of the analyst did not contain any data, no conviction could be founded on its basis and as the Yaddasht relating to

the sale had not been attested as required by law, the seizure in question must be held to be invalid. As against that decision, the Municipal Board of Saharanpur went up in appeal to the High Court under Section 417 (3), Cr. P. C. The High Court allowed the appeal disagreeing with the trial court on both the questions of law referred to earlier. It came to the conclusion that the analyst had given the necessary data and hence his report afforded sufficient basis for conviction. It further opined that the fact that the Yaddasht had not been attested by the witnesses of the locality, did not vitiate the seizure made. At the hearing of the appeal, no objection about the maintainability of the appeal was taken. The judgment of the High Court was rendered on April 18, 1966. The High Court convicted the appellant and sentenced him to undergo rigorous imprisonment for two months and to pay a fine of Rs. 100/-, in default to undergo further imprisonment for a period of one month. On April 28, 1966, the accused filed an application for certificate under Article 134 of the Constitution. On May 4, 1966, when the application filed under Article 134 of the Constitution for certificate was still pending, the accused moved the High Court under Section 561 (A), Cr. P. C. for reviewing its judgment of date April 18, 1966 principally on the ground that the appeal filed by the Municipal Board was not maintainable under Section 417 (3), Criminal Procedure Code as the complaint had been instituted by the Food Inspector and not by the Municipal Board. The application under Section 561 (A) was dismissed by the High Court as per its order of March 16, 1967 reported in 1967 All WR (HC) 223 repelling the contention of the accused that the complaint had not been instituted by the Municipal Board. It further came to the conclusion that it had no power to review its own judgment. The certificate prayed for under Art. 134 of the Constitution was also refused by a separate order of the same date. Thereafter this appeal was brought after obtaining special leave.

4. Mr. Garg, learned Counsel for the appellant strenuously contended that the appeal filed by the Municipal Board of Saharanpur before the High Court under Section 417 (3), Cr. P. C. was not maintainable as the complaint from which that appeal had arisen had been instituted by the Food Inspector. Section 417 (3) of the Criminal Procedure Code provides

that if an order of acquittal is passed in any case instituted upon complaint, the High Court may grant to the complainant special leave to appeal against the order of acquittal. It is clear from that section that special leave under that provision can only be granted to the complainant and to no one else. It may be noted that in this case no appeal against acquittal had been filed by the State. Hence the essential question for consideration is whether the complainant before the Magistrate was the Municipal Board of Saharanpur? The complainant shown in the complaint is the Municipal Board of Saharanpur but the complaint was signed by the Food Inspector. Section 20 of the Prevention of Food Adulteration Act, 1954 prescribes that no prosecution for an offence under that Act should be instituted except by, or with the written consent of, the Central Government or the State Government or a local authority or a person authorised in this behalf, by general or special order, by the Central Government or the State Government or a local authority. There is no dispute that the Municipal Board is a local authority. Hence it was competent to file a complaint. It was also competent for that board to authorise someone else to file complaints under the Prevention of Food Adulteration Act on its behalf. As seen earlier, the complaint purports to have been filed by the Municipal Board. That Board could have authorised its Food Inspector to file the complaint on its behalf. Neither in the trial court, nor in the High Court at the stage of hearing of the appeal, any objection was taken by the accused as to the maintainability either of the complaint or of the appeal. Both these courts and the parties before it proceeded on the basis that the Municipal Board, Saharanpur was the complainant and its Food Inspector had filed the complaint on its behalf. It is only after the disposal of the appeal, the accused for the first time took up the contention that the Municipal Board was not the real complainant.

5. It is true that the complaint was signed by the Food Inspector. As seen earlier it was competent for the Municipal Board to authorise him to file the complaint. The question whether he was authorised by the Municipal Board to file the complaint was never put into issue. Both the parties to the complaint proceeded on the basis that it was a validly instituted complaint. If the Municipal Board had not authorised him to

file the complaint then the complaint itself was not maintainable. If that is so, no question of the invalidity of the appeal arises for consideration. It was never the case of the accused that the complaint was invalid. In *K. C. Aggarwal v. Delhi Administration*, Criminal Appeal No. 100 of 1966 D/- 27-3-1969 this Court has held that a complaint filed by one of the officers of a local authority at the instance of that authority is in law a complaint instituted by that local authority. Therefore if the complaint with which we are concerned in this case had been filed by the Food Inspector on the authority of local board, the complaint must be held to have been instituted by the local board itself. The question whether the Food Inspector had authority to file the complaint on behalf of the local board is a question of fact. Official acts must be deemed to have been done according to law. If the accused had challenged the authority of the Food Inspector to file the complaint, the trial court would have gone into that question. The accused cannot be permitted to take up that contention for the first time after the disposal of the appeal. This Court refused to entertain for the first time an objection as regards the validity of a sanction granted in *Mangaldas Raghavji v. State of Maharashtra*, 1965-2 SCR 894 = (AIR 1966 SC 128). Mr. Garg, learned Counsel for the accused urged that a permission under Section 20 of the Prevention of Food Adulteration Act, 1954 to file a complaint is a condition precedent for validly instituting a complaint under the provisions of that Act. The fulfilment of that condition must be satisfactorily proved by the complainant before a court can entertain the complaint. Without such a proof, the court will have no jurisdiction to try the case. In support of that contention of his he sought to take assistance from the decision of the Judicial Committee in *Gokulchand Dwarkadas Morarka v. The King*, 75 Ind App 30 = AIR 1948 PC 82 and *Madan Mohan Singh v. The State of U. P.*, AIR 1954 SC 637. Both those decisions deal with the question of the validity of sanctions given for the institution of certain criminal proceedings. The provisions under which sanction was sought in those cases required the sanctioning authority to apply its mind and find out whether there was any justification for instituting the prosecutions. The Judicial Committee as well as this Court has laid down that in such cases, the court must be satisfied

either from the order of sanction or from the other evidence that all the relevant facts had been placed before the sanctioning authority and that authority had granted the sanction after applying its mind to those facts. The ratio of those decisions has no bearing on the facts of this case. Under Section 20 of the Prevention of Food Adulteration Act, 1954, no question of applying one's mind to the facts of the case before the institution of the complaint arises as the authority to be conferred under that provision can be conferred long before a particular offence has taken place. It is a conferment of an authority to institute a particular case or even a class of cases. That section merely prescribes that persons or authorities designated in that section are alone competent to file complaints under the statute in question.

6. For the reasons mentioned above, we are unable to accept the contention of the accused that the Municipal Board of Saharanpur was not competent to file the appeal.

7. The only other question canvassed before us is that the report of the analyst could not have afforded a valid basis for founding the conviction as the data on the basis of which the analyst had reached his conclusion is not found in that report or otherwise made available to the court. We are unable to accept this contention as well. It is not correct to say that the report does not contain the data on the basis of which the analyst came to his conclusion. The relevant data is given in the report. A report somewhat similar to the one before us was held by this Court to contain sufficient data in *Mangaldas's case* referred to earlier. The correct view of the law on the subject is as stated in the decision of the Allahabad High Court in *Nagar Mahapalika of Kanpur v. Sri Ram*, 1963 All LJ 765 = (AIR 1964 All 270) wherein it is observed: "that the report of the public analyst under Section 13 of the Prevention of Food Adulteration Act, 1954, need not contain the mode or particulars of analysis nor the test applied but should contain the result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated as defined in Section 2 (1) of the Act"

8. In the result the appeal fails and the same is dismissed. The appellant is on bail. He should surrender to his bail and serve the sentence imposed on him.

Appeal dismissed.

1970 CRI. L. J. 496 (Vol. 76, C. N. 116) =
AIR 1970 SUPREME COURT 326
(V 57 C 69)

(From Patna)*

S. M. SIKRI, G. K. MITTER AND
K. S. HEGDE, JJ.

Ram Prasad Sharma, Appellant 'v. The State of Bihar, Respondent.

Criminal Appeal No. 208 of 1966, D/- 30-7-1969.

Penal Code (1860), Sections 302, 304 — Accused charged under Section 302 for having shot down deceased with gun — Sessions Judge rejecting prosecution story on basis of entries in *chaukidar's hath chitha* which showed that deceased was dead prior to date of occurrence — Who made entry and whether it was made in discharge of official duty not proved — *Hath Chitha* is not admissible — Conviction by High Court on basis of other evidence and F. I. R., held, justified — Evidence Act (1872), Section 35.

Out of fourteen persons who were tried by Sessions Judge on various charges, one R was charged under Section 302, Penal Code, for having shot down with his gun one K when he opened fire on the crowd of the villagers. The Sessions Judge rejected the version of the prosecution regarding the shooting down of K mainly on the basis of entries in an attested copy of the *Chaukidar's hath chitha* according to which the death of K took place three days prior to the occurrence. The Sessions Judge also relied on the First Information Report in which the name of K did not find mention. There being no proof as to who made the entry and whether the entry was made in the discharge of any official duty, the High Court held the *hath chitha* inadmissible but on other evidence on record it came to the conclusion that K was actually shot down by R and convicted R. under Section 304, Penal Code. The High Court also accepted the explanation of prosecution witness who had made the F. I. R. that he had named one C as being the person shot and killed by R because he had heard a *hulla* that C had been murdered.

Held, that the High Court was right in holding the *hath chitha* inadmissible in evidence. The reason why an entry made by a public servant in a public or

*(Criminal Appeal No. 530 of 1962 and Govt. Appeal No. 44 of 1962, D/- 22-2-1966—(Pat.).)

LM/AN/E5/69/GDR/D

other official book, register or record stating a fact in issue or a relevant fact has been made relevant under Section 35 of Evidence Act is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. Inasmuch as there was no proof that the entry was made by a public servant in the discharge of his official duties, the hath chitha was rightly held to be inadmissible. (Para 12)

Held further that the High Court was right in accepting the explanation of prosecution witness who had made the F. I. R. AIR 1945 Pat 489 and AIR 1965 SC 282, Rel. on; Cri. A. No. 530 of 1962 and Govt. Appeal No. 44 of 1962, D/-22-2-1966 (Pat), Affirmed. (Para 13)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 282 (V 52) =

1965-3 SCR 861, Brij Mohan

Singh v. Priya Brat Narain Sinha

11, 12

(1945) AIR 1945 Pat 489 (V 32) =

26 Pat LT 225, Sanatan Senapati

v. Emperor

11

M/s. A. S. R. Chari and M. K. Ramamurthi, Senior Advocate (M/s. G. Ramamurthy and Vineet Kumar Advocates, with them), for Appellant, Mr. B. P. Jha, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: Fourteen persons were tried by the learned Second Additional Sessions Judge, Bhagalpur, on various charges. Out of these 14 persons Sheo Prasad Sharma and Ram Prasad Sharma were charged under Section 302, I. P. C. Sheo Prasad Sharma was charged under Section 302 for having intentionally caused the death of Qudrat Mian by shooting him down with his gun whereas Ram Prasad Sharma was charged under this section for having shot down with his gun Kaleshwar Yadav and thus having caused the murder of this person.

2. The Second Additional Sessions Judge, Bhagalpur convicted Sheo Prasad Sharma under Sections 304, 324/34, 201 and 148 and sentenced him to seven years rigorous imprisonment. The appellant, Ram Prasad Sharma was convicted under Sections 326/149, 324/34, 201 and 148, I. P. C. and sentenced to four years rigorous imprisonment. Seven other accused were also convicted but it is not necessary to mention the sections under which they were convicted. Five of the accused persons were acquitted by the

learned Second Additional Sessions Judge.

3. Two appeals were filed before the High Court, one by the State and the other by the nine convicted persons, including Ram Prasad Sharma. Both the appeals were heard together. The High Court accepted the appeal of the State as far as Ram Prasad Sharma was concerned and convicted him under Section 304, I. P. C., in connection with the shooting and causing the death of Kaleshwar and sentenced him to rigorous imprisonment for seven years. The convictions of seven others were altered from under Sections 326/149 to one under Sections 304/149 but the sentence of four years rigorous imprisonment was maintained. In other respects the convictions were maintained. The High Court, however, quashed the convictions under Section 201, I. P. C.

4. The nine convicted persons filed petition for special leave to appeal. This Court by its order dated October 4, 1966 rejected the petition except as regards Ram Prasad Sharma and his appeal is now before us.

5. The prosecution case as accepted by the High Court was, in brief, as follows. On August 15, 1960, at about 1.30 or 2 p.m., by the side of a Danr (water channel) known as Chaksafia Danr at village Bindi about five miles away from police Station, Banka, a serious occurrence took place. The Chaksafia Danr runs between village Bindi which is to its east and Banki which is to its west and then goes further north to village Bhadrar and other villages. Lands of several villages, namely, Bhadrar, Nayadih, Uprama, Basuara, Jitnagar, Majhiara, Banki, etc. are irrigated from the water of this Danr and there are detailed entries regarding the respective rights of the different villages in the Fard Abpashi which was prepared at the time of the last survey. It appears that the villagers of different villages who enjoy the above rights go in a body every year during the rainy season for clearing this Danr in order that there may not be any obstruction in the flow of water therein. On the date of occurrence, i. e. August 15, 1960, a number of persons of villages Bhadrar, Nayadih, Uprama, Basuara, Jitnagar and Bhatkunki went along with spades to clear this Danr in the usual course and some of them had lathis also with them. The total number of persons were estimated to vary from about 150 to about 400. When they reached the brick kiln, which exists in

Malmala Tikar they were confronted by a mob of 40 to 50 persons including all the convicted persons. Sheo Prasad Sharma and Ram Prasad Sharma were armed with guns and Patal Thakur was armed with a pharsa and the remaining accused except Dhanusdhari Mehta were armed with bhalas.

6. It may be mentioned that in the First Information Report Dhanusdhari Mehta was alleged to have been armed with a pistol but this allegation was subsequently given up. Dhanusdhari Mehta was a retired Inspector of police; his son Ram Prasad Sharma was practising lawyer at Bhagalpur at the time of the occurrence in question.

7. On seeing this crowd of villagers, Sheo Prasad Sharma directed them to return and threatened to shoot them if they failed to do so. There was some exchange of hot words and brick-bats were thrown by both sides. Sheo Prasad Sharma thereafter fired one shot towards the sky but the villagers did not disperse. Then Dhanusdhari ordered his two sons Ram Prasad Sharma and Sheo Prasad Sharma to open fire on the villagers. On this both Ram Prasad Sharma and Sheo Prasad Sharma opened fire with their guns on the villagers. One shot fired by Sheo Prasad Sharma hit one Qudrat Mian and he fell down and died on the spot. One other villager was alleged to have been shot by Ram Prasad Sharma and he died on the spot. A number of villagers sustained gun shot injuries and as a result of the firing by Sheo Prasad Sharma and Ram Prasad Sharma, who are estimated to have fired about 12 rounds, the villagers dispersed. Sobhan Mandal, one of the injured person went to the Police Station with three other injured persons, namely, Chotan Rai, P. W. 5, Jagdeo Choudhary, P. W. 8 and Kishori Prasad Singh, P. W. 12, who had also sustained gun shot injuries.

8. The learned Additional Sessions Judge had rejected the prosecution story that Kaleshwar Yadav was shot and killed during the occurrence. He had come to the conclusion that Kaleshwar Yadav had died prior to the date of occurrence. The High Court has accepted the prosecution version and it is this finding which is being seriously challenged by the learned counsel for Ram Prasad Sharma, appellant.

9. The learned Additional Sessions Judge had rejected the version of the prosecution regarding the shooting down of Kaleshwar Yadav mainly on the basis

of entries in an attested copy of the Chaukidar's hath chitha (Ext. D) according to which the death of Kaleshwar took place in Gopalpur mauza on August 12, 1960, that is, three days prior to the occurrence. The learned Additional Sessions Judge had also relied on the First Information Report in which the name of Kaleshwar Yadav does not find mention.

10. Two points arise before us, first, whether the hath chitha is admissible in evidence, and secondly, whether on the evidence on record it is otherwise proved that Kaleshwar Yadav was shot down by the appellant Ram Prasad Sharma.

11. According to the entries in this document, Ext. D, Kaleshwar Yadav died on August 12, 1960, in Gopalpur Mauza and in the remarks column of this register he is described as "Bahanoi (brother-in-law) of Asarfi Yadav." We looked at the attested copy produced in Court and we were unable to ascertain the date on which the attested copy had been obtained by the defence. The only dates this document bears are the date of attestation (October 15, 1960) by the District Statistical Officer, the date September 22, 1960, next to the signature of one Shukdeo Chowdhary, and the date of admission by the Additional Sessions Judge (June 25, 1962). As rightly pointed out by the High Court the learned Sessions Judge took this copy on record in an extraordinary manner. The prosecution evidence closed on June 21, 1962 and on June 25, 1962, this attested copy was admitted in evidence without any proof. On the same day an order was passed calling for the original. On the very next day the Public Prosecutor filed a petition objecting to the admission of this document and alleged that the document was bogus. The hearing of the argument thereafter proceeded on July 4, 1962. The Public Prosecutor again filed a petition that this document be not taken in evidence. The learned Additional Sessions Judge disposed of this petition with the following order:

"Let the petition be placed with the record. The original has once again been called for. The matter will be discussed in the judgment."

It is pointed out by the High Court that there is no further reference to the document in the order sheet. After the arguments concluded on July 7, 1962, the case was adjourned for judgment. The judgment of the learned Additional Sessions Judge shows that the original was subsequently received by him with letter dated

July 10, 1962, and he observed that he was satisfied about its genuineness. The High Court rightly pointed out that the Additional Sessions Judge should have dealt with the question of the admissibility of the document. The High Court, following *Sanatan Senapati v. Emperor*, AIR 1945 Pat 489 and *Brij Mohan Sinha v. Priya Brat Narain Sinha*, 1968-3 SCR 861 = (AIR 1965 SC 282) held that the document was inadmissible in evidence.

12. We agree with the conclusion arrived at by the High Court. Section 35 of the Evidence Act provides:

"An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

In this case it has not been proved that the entry in question was made by a public servant in the discharge of his official duties. As observed by this Court in 1965-3 SCR 861 at p. 864 = (AIR 1965 SC 282 at p. 286) "the reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high." No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. In the result we must hold that Ex. D, the hath chitha, was rightly held by the High Court to be inadmissible.

13. The High Court then dealt with the other evidence on the record and came to the conclusion that Kaleshwar was actually shot down by the appellant, Ram Prasad Sharma. The learned counsel for the appellant has tried to assail these findings but he has not been able to show in what way the High Court has gone wrong in coming to the conclusion. The High Court states that ten witnesses have named Kaleshwar being the second person who was shot. Further Kaleshwar's son and widow, P. Ws. 24 and 34, Chamak Lal Yadav and Karma Devi, deposed that on the day of occurrence Kaleshwar had left his house with a Kudal and had gone to Chaksafia Danr along with others. They further deposed that on the next day they learnt from

Nandai Lal Singh, P. W. 17, that Kaleshwar had been killed. The High Court further accepted the explanation of P. W. 1, who had made the F. I. R., that he had named Choltan as being the person shot and killed by Ram Prasad because he had heard a hulla that Choltan had been murdered. It seems to us that the High Court came to a correct conclusion and was right in accepting the explanation of P. W. 1.

14. The learned counsel further contends that it was doubtful that 12 rounds would have been fired. He points out the number of injuries received by the villagers. But these injuries support the prosecution story. From the injuries on the various persons examined by Dwarka Nath Prasad, P. W. 41, apart from the persons who had died and whose bodies had been held to have been cremated by unidentified persons, it appears that 20 persons had received gun shot injuries; one of them had as many as 14 lacerated wounds and another had 10 lacerated wounds. Apart from that there is no reason to doubt the oral evidence given in this case that a number of rounds were fired.

15. In the result the appeal fails and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 499 (Vol. 76, C. N. 117) =
AIR 1970 SUPREME COURT 329
(V 57 C 70)

(From Goa, Daman and Diu J. C.'s Court
— AIR 1968 Goa 17)

M. HIDAYATULLAH C. J., S. M. SIKRI,
R. S. BACHAWAT, G. K. MITTER AND
K. S. HEGDE JJ.

Rev. Mons. Sebastiao Francisco Xavier
dos Remedios Monteiro, Appellant v. The
State of Goa, Respondent.

Criminal Appeal No. 50 of 1968, D/-
26-3-1969.

(A) Geneva Conventions Act (1960) Sch.
IV, Arts. 6 and 47 — "Occupation" —
Meaning — In the case of annexation of
Goa, the occupation was true annexation
by subjugation and as such had ceased in
the sense contemplated by Art. 47 —
Terms "Annexation," and "subjugation" —
Meaning.

The principle which is accepted is that
the Occupying Power must apply the Con-
ventions even when it claims, during con-

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flict, to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. Article 6 mentions a period of one year because if the occupied power turns victorious the land would be freed in one year and if the occupying power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation, comes to an end when hostilities cease and the territory becomes a part of the occupying power. Annexation may sometimes be peaceful, or after war. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title. In the case of military action in Goa the military engagement was only a few hour's duration and there was no resistance at all. The final annexation date was December 20, 1961 when the entire government and administration were taken over and there was no army in occupation and no army in opposition. The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. Therefore since occupation in the sense used in Art. 47 had ceased, the protection must cease also. 1953 ICJ 47, Ref.

(Paras 26, 27 and 28)

The definition of 'occupation' in the Hague Regulations has to be read since the Regulations are the original rules and the Conventions only supplement the Regulations. The definition in Art. 42 of the Regulations shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. Thus as to whether occupation in Art. 47 is belligerent occupation which continues after the total defeat of the enemy. Courts must take the facts of State from the declaration of state authorities. Military occupation is temporary *de facto* situation which does not deprive the occupied power of its sovereignty nor does it take away its statehood. All that happens is that *pro tempore* the Occupied Power cannot exercise its rights. In other words belligerent occupation means that the Government cannot function and authority is exercised by the occupy-

ing force. Annexation on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a *de jure* right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. There is however a difference between true annexation on the one hand and premature annexation, or as it is sometimes called 'anticipated annexation' on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated. Subjugation puts an end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the *de facto* but also the *de jure* title passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

(Paras 21 to 25)

(B) Geneva Conventions Act (1960), Preamble — Act does not give special remedy but gives indirect protection by providing for breaches of Conventions.

The Geneva Conventions Act by itself does not give any special remedy. It does give indirect protection by providing for breaches of conventions. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter as indignation of mankind.

(Para 15)

(C) Constitution of India, Art. 51 — International Law — Reception and residence of alien is discretionary with State.

It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to

exclude aliens from the whole or any part of its territory. This proposition is so well grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens and can make laws for regulating the entry, residence and eviction of aliens. 1891 AC 272, Rel. on.

(Para 6)

Cases Referred: Chronological Paras
(1953) 1953 ICJ 47, Minguiers and

Enerenos case

28

(1891) 1891 AC 272 = 61 LT 378,

Musgrove v. Chnn Terong Toy

6

(1584) 3 Co. Rep. 7-a = 76 ER 637,

Heydon's case

10

Mr. Edward Gardner, Q. C., M/s. A. Bruto Da Costa, M. Bruto Da Costa, P. C. Bhartari, Mrs. A. K. Varma, Advocates and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., for Appellant, Mr. Niren De Attorney General for India and Mr. G. R. Rajagopaul, Senior Advocate (M/s. J. M. Mukhi and R. H. Dhebar, Advocates with them), for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: The appellant (Rev. Father Monteiro) is a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He chose the latter and was registered as a foreigner. He also obtained a temporary residential permit which allowed him to stay on in India till November 13, 1961. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. The Lt. Governor is empowered by a notification of the President of India issued under Art. 239 of the Constitution to discharge the functions of the Central Government and his order has the same force and validity as if made by the Central Government. Rev. Father Monteiro disobeyed the order, and in consequence was prosecuted under S. 14 read with S. 3(2)(c) of the Foreigners Act. He was convicted and sentenced to 30 days simple imprisonment and a fine of Rs. 50 (or 5 days' further simple imprisonment). He appealed unsuccessfully to the Court of Session and his revision application to the Court of the Judicial Commissioner, Goa also

failed. He now appeals by special leave of this Court against the order of the Judicial Commissioner, Goa dated August 7, 1967.

2. The defence of Rev. Father Monteiro was that he was protected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was ultra vires the Act and that he had committed no offence. The Judicial Commissioner and the two courts below have held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India can give him no redress against an Act of State. In the appeal before us Mr. Edward Gardner Q. C. appeared for Rev. Father Monteiro with the leave of this Court.

3. To understand the case, a brief history of the annexation of Goa and what happened thereafter is necessary. Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by the Indian Armed Forces following a short military action. It then came under Indian Administration from December 20, 1961 and was governed under the Goa, Daman and Diu (Administration) Ordinance 1962 promulgated by the President of India. Under the Ordinance all authorities were to continue performing their functions and all laws (with such adaptations as were necessary) were to continue in force and power was conferred on the Central Government to extend to Goa other laws in force in India. The Ordinance was later replaced by an Act of Parliament bearing the same title and numbered as Act I of 1962. It was enacted on March 27, 1962 and came into force from March 5, 1962. It re-enacted the provisions of the Ordinance and in addition gave representation to Goa in Parliament amending for the purpose the Representation of the People Act. The same day (March 27, 1962), the Constitution (Twelfth Amendment) Act, 1962 was enacted and was deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and a reference to Goa was inserted in Article 240 of the Constitution. Many Acts in force in India were then extended to Goa and many Regulations and Orders were promulgated. Amongst the Acts so extended were the Citizenship Act of 1955, the Foreigners Act 1946 and the Registration of Foreigners Act, 1939. The Central Government also promulgated under S. 7 of the Citizenship Act, 1955,

the Goa, Daman and Diu (Citizenship) Order 1962 and as it directly concerns the present matter we may reproduce the second paragraph of the Order (in so far as it is material to our purpose) here:

"2. Every person who or either of whose parents or any of whose grand-parents was born before twentieth day of December, 1961, in the territories now comprised in the Union Territory of Goa, Daman and Diu shall be deemed to have become a citizen of India on that day.

Provided that any such person shall not be deemed to have become a citizen of India as aforesaid if within one month from the date of publication of this Order in the Official Gazette that person makes a declaration in writing to the Administrator of Goa, Daman and Diu or any other authority specified by him in this behalf that he chooses to retain the citizenship or nationality which he had immediately before the twentieth day of December 1961.

Provided further "

4. Pursuant to this Order, on April 27, 1962 Rev. Father Monteiro made his declaration of Portuguese nationality and on August 14, 1964 applied for a residential permit. On his failure to apply for a renewal of the permit the order of the Lt. Governor was passed on June 19, 1965. Prosecution followed the disobedience of the order.

5. At the outset it may be stated that Mr. Gardner concedes that he does not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation during occupation which has not validly come to an end, and, therefore, no offence was committed by him.

6. The argument overlooks one cardinal principle of International Law and it is this Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. This proposition is so

well-grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens and can make laws for regulating the entry, residence and eviction of aliens. Therefore, the application of the Foreigners Act, the Registration of Foreigners Act and the Orders passed under them, to Rev. Father Monteiro was legally competent. A considerable body of writers on International Law support the proposition and it is sufficient to refer only to Oppenheim (Vol. I) pp. 675/676 and Brierly Law of Nations p. 217. If authority were needed the proposition would be found supported in the decision of the Privy Council in *Musgrove v. Chun Teeong Toy* 1891 AC 272. The Lord Chancellor in that case denied that an alien excluded from British Territory could maintain an action in a British Court to enforce such a right.

7. This proposition being settled, Mr. Gardner sought support for his plea from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions. Mr. Gardner relies on the provisions of the Fourth Schedule relative to the protection of certain persons in time of war. He refers in particular to Articles 1, 2, 4, 6, 8, 47 and 49. By Articles 1 and 2 there is an undertaking to respect and ensure respect for the Conventions in all circumstances of declared war or of any other armed conflict even if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance. Article 4 defines a protected person and the expression includes those who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 then lays down the beginning and end of application of the Convention. The Convention applies from the outset of any conflict or occupation. In the territory of Parties to the conflict, the application of the Convention ceases on the general close of Military operation. In the occupied terri-

tory it ceases one year after the general close of military operations but the occupying Power is bound for the duration of occupation, to the extent that such Power exercises the functions of Government in such territory, by Articles 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-73 and 143.

8. We next come to Articles 47 and 49 which are the crux of the matter and are relied upon for the protection. Mr. Gardner points out that under Article 48 even protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the Conventions. The case, therefore, depends on whether Articles 47 and 49 apply here. We may now read Articles 47 and 49:

"47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

"49. Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuation may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Powers undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

9. The point of difference between the parties before us in relation to Article 47 is whether the occupation continues, the annexation of the territory notwithstanding, and in relation to Art. 49 whether the order of the Lt. Governor amounts to deportation of a protected person.

10. Mr. Gardner's submissions are: the order that has been made is a deportation order and it is therefore ultra vires the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as occupation continues these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abandoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in International Law by the use of force does not confer any title. Occupation, therefore, can only be of terra nullius, not now possible. He invokes the rule in *Heydon's case*, 1584-3 Co. Rep. 7-a case and says that the history of the making of the Geneva Conventions shows that this was precisely the mischief sought to be met and the Conventions now become a part of the laws of India through Parliamentary Legislation. He concedes that the war of liberation of Goa and the annexation were lawful but he contends that annexation does not deprive protected persons of the protection. According to him, once there is military action and occupation, occupation cannot cease by a unilateral act of annexation by incorporating the territories of Goa with India. If India did not care to be bound by the Conventions, there was a method of denunciation in Article 158 but since the Convention is registered under Article, 159 even denunciation at a late stage was not possible. He relies upon Article 77 and says that 'Liberated' means when the occupation comes to an end. The amendment of the Constitution only legalises annexation so far as India is con-

cerned but in International Law the territory remains occupied. The occupation is not at an end and it cannot be brought about unilaterally. The words of Art. 47 themselves are clear enough to establish this. In short, the contention is that occupation does not come to end by annexation and, therefore, the protection continues till there is either cession of territory or withdrawal of the Occupying Power from the territory, both of which events have not taken place. In support of his propositions he relies upon Dholakia (International Law) Pp. 180, 181, 293, Oppenheim International Law (Vol. I) 7th Edn. Pp. 574 et seq; R. Y. Jennings. The Acquisition of Territories in International Law Pp. 53-56, 67.

11. The contention on behalf of the State is that by occupation is meant occupation by armed forces or belligerent occupation and occupation comes to an end by conquest followed by subjugation. Reference is made to many works on International Law. We have to decide between these two submissions.

12. This is the first case of this kind and we took time to consider our decision. We are of opinion that the pleas of Mr. Gardner that the Geneva Conventions Act makes punishable the conduct of Rev. Father Monteiro, must fail.

13. To begin with, the Geneva Conventions Act gives no specific right to any one to approach the Court. The Act was passed under Article 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provides for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the Municipal Court is not very clear but we need not consider the point because of our conclusions on the other parts of the case. We shall consider the Conventions themselves. Before we consider the Geneva Conventions, which form Schedules to the Act, it is necessary to look at the Act itself to see what rights it confers in relation to the Conventions, and whether it gives a right to Rev. Father Monteiro in the present circumstances to invite the Court's opinion. Being a court of law, this Court must be satisfied about its own jurisdiction, the foundation for which must be in some enforceable law.

14. Prior to the Geneva Conventions Act of 1960 there were the Geneva Convention Act of 1911 and the Geneva Con-

ventions Implementing Act of 1936. We need not consider them because by the twentieth section of the present Act, the former ceases to have effect as part of the law of India and the latter is repealed. The Act is divided into five Chapters, Chapter I deals with the title and extent and commencement of the Act and gives certain definitions. Of these, the important definition is that of 'protected internee' as a person protected by the Fourth Convention and interned in India. Chapter II then deals with punishment of offenders against the Conventions and the jurisdiction of courts to deal with breaches by punishing them. Chapter III lays down the procedure for the trial of protected persons, for offences enabling a sentence of death or imprisonment for a term of two years or more to be imposed and for appeals etc. Chapter IV prohibits the use of Red Cross and other emblems without the approval of Central Government and provides for a penalty. Chapter V gives power to the Central Government to make rules. The Act then sets out the Conventions in its schedules and the Conventions which are four in number are set out in as many Schedules to the Act.

15. It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for breaches of Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind.

16. The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence. We may, therefore, say a few words about the Geneva Conventions, particularly Schedule IV, which deals with the protection of civilian persons in time of war. In the past protection of civilian population was inadequately provided in Conventions and treaties. The four conventions came at different times,

the oldest in 1864 and the last in 1919. The Fourth Hague Convention of 1907 contained Articles 42-56, but this protection was restricted to occupation by an enemy army. The Regulations merely stated the principles and enjoined maintenance of law and order and regard for family rights, lives of persons and private property, and prohibited collective punishments. In effect, these were confined to the 'forward areas of war' and did not apply when 'total war' took place and the civilian population was as much exposed to the dangers of war as the military. The example of the First World War showed that civilian population was exposed to exactions. At the time when the Hague Regulations were done, it was thought that such matters as non-internment of the nationals of the adversary would be observed. But the First World War proved to the contrary. It was in 1921 that the International Committee of the Red Cross produced a draft Convention which among other things enjoined that the inhabitants of the occupied territory should not be deported and civilians in enemy territory must be allowed to return to their homes unless there were reasons of State security and the internees must receive the same treatment as prisoners of war. The Diplomatic Conference of 1929 and the Red Cross Conference of 1934 made useful studies but action scheduled to take place in 1940 could not be implemented as the Second World War broke out. Although the belligerent countries had accepted that the 1929 Convention regarding prisoners of war was applicable to civilians, the lessons of the Second World War were different. We know the treatment of civilians by Germany and the horrid deaths and privations inflicted on them. War, though outlawed, continues still and as President Max Huber said:—

"War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger."

17. At the termination of the last war the International Red Cross Conference at Stockholm prepared a draft in 1948, which became the basis of the deliberations of the Diplomatic Conference which met at Geneva from April 21 to August 12, 1949 and the present Convention was framed. The Regulations were not revised or incorporated. The 1949 Conventions are additional to the Regulations and it is expressly so laid down in Arti-

cile 154 of the Geneva Conventions.

18. The Hague Regulations, Arts. 42—56, contained some limited and general rules for the protection of inhabitants of occupied territory. The Regulations are supplementary. Regulations 43 and 55 which have no counterpart in the Geneva Conventions must be read. They are not relevant here. Similarly, as there is no definition of 'occupation' in the Geneva Conventions, Article 42 of the Regulation must be read as it contains a definition: "42. A territory is considered as occupied when it finds itself in fact placed under the authority of hostile army".

19. The Regulations further charge the authority having power over the territory to take all measures to establish and assure law and order. The Regulations generally charged the occupying power to respect the persons and property of the inhabitants of the occupied territory. There was no provision showing when occupation commenced and when it came to an end. It is because of this omission that it is claimed in this case that occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions obtains. However, Article 6 which provides about the beginning and end of the application of the Conventions throws some light on this matter.

20. The question thus remains what is meant by occupation? This is, of course, not occupation of terra nullius but something else. Since there is no definition of occupation in the Geneva Conventions, we have to turn to the definition in the Hague Regulations. Article 154 of the 4th Schedule reads:

"154. Relation with the Hague Conventions.—In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29th July, 1899, or that of 18th October, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of the Hague."

21. The definitions of 'occupation' in the Regulations must be read since the Regulations are the original rules and the Conventions only supplement the Regulations. We have already quoted the definition and it shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile

army. This means that occupation is by military authorities. In the Justice case, (*United States v. Attstoccer, et al.* (1947) U. S. Military Tribunal, Nuremberg L.R. 3 T.N.C. vi 34) it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation.

22. The question thus resolves itself into this. Is occupation in Article 47 belligerent occupation or occupation which continues after the total defeat of the enemy? In this connection courts must take the Facts of State from the declaration of State authorities. Military occupation is temporary de facto situation which does not deprive the Occupied Power of its sovereignty nor does it take away its Statehood. All that happens is that pro tempore the Occupied Power cannot exercise its rights. In other words belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

23. Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a de jure right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. As Greenspan—*The Modern Law of Land Warfare* put it (p. 215) military occupation must be distinguished from subjugation, where a territory is not only conquered, but annexed by the conqueror.

24. There is, however, a difference between true annexation on the one hand and premature annexation, or as it is sometimes called 'anticipated annexation', on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated. (See *Oppenheim International Law* (7th Edn) pp. 846-847 (Vol. I) 566 (Vol. I), pp. 448/52 (Vol. II), 430-439 (Vol. II) and 599 et. seq. (Vol. II), Greenspan (*ibid*) pp 215 et seq. 600-603, *Could Introduction to International Law* pp. 652-656, 662-663, Brierly: *Law of Nations* p 155.

25. The Conventions rightly lay down that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or

anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word 'alleged' before 'annexation' in Article 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the State of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the de facto but also the de jure title passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

26. Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims during conflict to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. It may be asked why does Article 6 then mention a period of one year? The reason given is that if the Occupied Power turns victorious the land would be freed in one year and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation, comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. Annexation may sometimes be peaceful, as for example, Texas and Hawaiian Islands were peacefully annexed by the United States or after war, as the annexation of South Africa and Orange Free State by Britain.

27. The question, when does title to the new territory begin, is not easy to answer. Some would make title depend upon recognition. Mr. Stimson's doctrine of non-recognition in cases where a State of things has been brought about contrary to the Pact of Paris was intended to deny root of title to conquest but when Italy conquered Abyssinia, the conquest was recognised because it was thought that the state of affairs had come to stay. Thus, although the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Art 2 para 4), events after the Second World War have

shown that transfer of title to territory by conquest is still recognised. Prof. R. Y. Jennings poses the question: "What is the legal position where a conqueror having no title by conquest is nevertheless in full possession of the territorial power, and not apparently to be ousted?" He recommends the recognition of this fact between the two States. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.

28. In the present case the facts are that the military engagement was only a few hours' duration and then there was no resistance at all. It is hardly necessary to try to establish title by history traced to the early days as was done in the *Minguers and Eneenos* case, 1953 SCJ 47. Nor is there any room for the thesis of Dr. Schwarzenberger (*A Manual of International Law*, 5th Edn. p. 12) that title is relative and grows with recognition. True annexation followed here so close upon military occupation as to leave no real hiatus. We can only take the critical date of true and final annexation as December 20, 1961 when the entire government and administration were taken over and there was no army in occupation and no army in opposition. The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. It must be remembered that Mr. Gardiner concedes that the annexation was lawful. Therefore since occupation in the sense used in Article 47 had ceased, the protection must cease also. We are, therefore, of opinion that in the present case there was no breach of the Geneva Conventions.

29. We were invited to look at the matter from another point of view, namely, even if the protection against deportation envisaged by Arts. 47 and 49 were taken to be continued, what is the remedy which the Municipal Courts can give? It was said, the act was an act of State. In view of what we have already held it is not necessary to pronounce our opinion on this argument.

30. The national status of subjects of the subjugated State is a matter for the State, and courts of law can have no say in the matter. As Oppenheim (Vol. 1 p. 573) puts it:

"The subjugating State can, if it likes, allow them to emigrate, and to renounce their newly acquired citizenship, and its Municipal law can put them in any position it likes, and can in particular grant

or refuse them the same rights as those which its citizens by birth enjoy."

The Geneva Convention ceased to apply after, December 20, 1961. The Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was, therefore, rightly prosecuted under the law applicable to him. Since no complaint is made about the trial as such, the appeal must fail. It will be dismissed.

Appeal dismissed.

1970 CRI. L. J. 507 (Vol. 76, C. N. 118) =
AIR 1970 SUPREME COURT 356
(V 57 C 76)

(From: Bombay)

V. BHARGAVA AND K. S. HEGDE, JJ.
Jotiram Laxman Surange, Appellant v.
State of Maharashtra, Respondent.

Criminal Appeal No. 181 of 1968, D/-
8-10-1969.

Prevention of Corruption Act (1947),
Section 5 (1) (d) — Penal Code (1860),
S. 161 — Secretary of Gram Panchayat
who was also Talati charged for offence
of taking bribe — Plea of accused that
he took money for purchasing small
savings certificates for complainant and
not for substituting his name in revenue
records — Conviction under Section 5 (1)
(d) and Section 161 held proper in view
of circumstances found against him.

The accused, a secretary of a Gram Panchayat and also Talati was alleged to have taken a certain sum as bribe from the complainant for substituting the name of the complainant as the owner of certain plot of land, in the revenue records. The accused raised the plea that the money, he took from the complainant was not by way of bribery but for purchasing the small savings certificates for the complainant and that he was authorised to collect the money for the purpose.

Held, that the accused could be rightly convicted under Section 5 (1) (d) and Section 161 Penal Code as the circumstances found against the accused were (i) that he informed complainant that his name was entered in the records although he kept the entries open and his plea that he did so for demanding money for Small Savings Certificates was wrong. (ii)

LM/LM/F163/69/MVJ/M

No receipt was given by the accused to the complainant for the amount received (iii) along with the amount he did not ask for an application signed by the complainant for purchase of certificates which was an essential thing (iv) On the very first occasion when the accused was asked by his superior authorities he did not put forward the explanation that the alleged sum was received by him for purchase of certificates (v) the sum was accepted not in the office or in the house of accused but at the house of a third person (vi) there was nothing on the record to show that there was any enmity between the accused and the complainant. (Para 6)

The following Judgment of the Court was delivered by

BHARGAVA, J.— This appeal by special leave has been filed by Jotiram Laxman Surange who was convicted by the High Court of Bombay for offences punishable under Section 5 (1) (d) of the Prevention of Corruption Act and Section 161 of the Indian Penal Code read with Section 5 (2) of the said Act in an appeal filed by the State Government against his acquittal by the trial Court.

2. The prosecution case was that one Thakur was the Mukhtiar of a money-lender and landlord Shendure and used to look after his Court work also. In 1946, Shendure had advanced money to one Shindgonda Desai and had obtained a mortgage of Survey Plot No. 78 in village Idarguchi with possession. On 25th June, 1960, Shendure purchased this plot in Court sale after obtaining decree on the basis of his mortgage. In August, 1963, the appellant took charge of the post of Secretary of Gram Panchayat and of Talati of this village. On 9th January, 1964, the appellant sent a letter to Thakur informing him that the entry against this land had been made in the name of his master Shendure. On the same day, one Dundappa presented an application to the appellant objecting to the entry of Shendure's name in the record showing him in possession of this plot. Dundappa was claiming to be cultivating this plot on the basis of sharing of crop with Shendure. On 12th June, 1964, an application was made by Thakur on behalf of his master Shendure for investment of a sum of Rs. 50/- in small savings certificates, because that amount had been paid by Thakur to the appellant for this purpose. There is some dispute as to the date when this sum of Rs. 50/- was paid. According to the prosecution the payment

was made in December, 1963, while, according to the appellant, it was made in June, 1964, shortly before this application. In August, 1964, the application was returned by the Post Office refusing to issue small savings certificates on the ground that the application was signed by Thakur and not by Shendure in whose favour these certificates were to be issued. These proceedings took place because the appellant was also making collections for small savings certificates. About the same time, Shendure wanted that there should be a measurement and demarcation of his plot No. 78 and, for this purpose, he needed an extract of record of rights from the appellant. He directed Thakur to obtain the extract in view of the notice already received by Thakur from the appellant that Shendure's name had been entered against this plot. On 3rd December, 1964, Thakur met the appellant in a witness shed in the Court compound and asked the appellant to issue the extract. The appellant demanded a bribe of Rs. 500/- by informing Thakur that Shendure's name was not yet entered in the papers and that an objection had been filed by Dundappa on 9th January, 1964. The appellant promised to tear off the application of Dundappa if the bribe was paid to him. Ultimately, after negotiations, the amount of bribe was settled at Rs. 200/-. On 7th December, 1964, Thakur informed Shendure about this settlement with the appellant, whereupon Shendure asked Thakur to give information to the police. On 8th December, 1964, Thakur lodged a complaint with the police, as a result of which a trap was laid on 10th December, 1964. A sum of Rs. 150/- in currency notes was marked by putting anthracene powder on them and Thakur was given these notes in order to hand them over to the appellant. The Inamdar was asked to send for the appellant who happened to be busy in some meeting. He met the appellant at about 10 45 a. m. When the appellant came Thakur asked him whether he had brought the requisite register for issuing the extract of the record of rights. The appellant told Thakur that he had brought the extracts, though not the register. The extracts shown to Thakur were, however, undated. The appellant put the date in the presence of Thakur on the extracts and gave the extracts to Thakur after accepting the payment of Rs. 150/-. The arrangement was that this sum of Rs. 150/- together with the

sum of Rs. 50/-, which was already with the appellant and which could not be spent for purchase of small savings certificates, would make up the full amount of bribe money of Rs. 200/- settled between them. After the appellant had received the money, Thakur went down from Inamdar's house and informed the police and other witnesses who were waiting outside. As the appellant attempted to go out, he was stopped and the money was demanded from him. The appellant produced the sum of Rs. 150/- in currency notes which were attached under a Panchanama and, ultimately, a charge-sheet was filed against the appellant for acceptance of this bribe.

3. The appellant admitted the receipt of both the sums of Rs. 50/- and Rs. 150/-, but his case was that both the amounts were given to him for purchase of small savings certificates and there was no question of payment of any bribe. He also admitted that the notes for Rs. 150/- were recovered from him after they had been handed over to him by Thakur, but his case was that he did not know that any trap was being laid in order to charge him with the offence of accepting a bribe. According to him, he had been asked by his superior authorities to collect money for small savings certificates with a cautioning note that the efficiency of his work would be judged on the basis of success in making collections for the small savings. He accepted the case of the prosecution that he had kept the entries against Survey Plot No. 78 blank and had not entered the name of Shendure, but, according to him, the object was not to accept the bribe but to bring pressure on Shendure to contribute towards the small savings drive.

4. The trial Court accepted the plea of the appellant and held that it was more likely that he accepted the money for purchase of small savings certificates for Shendure and, though a trap was laid at the instance of Thakur, the appellant was innocent because he at least did not accept the money as a bribe. It was Thakur who had this trap laid in order to get the appellant involved in this criminal case. The High Court, on appeal by the State, differed from the trial Court and held that, on the facts and circumstances of this case, the finding given by the trial Court was entirely wrong and the acquittal of the appellant was totally unjustified. Consequently, the High Court allowed the appeal of the State and con-

victed and sentenced the appellant as above.

5. In view of the case put forward by the prosecution and the appellant, mentioned above, the only question that really requires examination is whether Thakur's case that he paid this amount as a bribe to the appellant in order to obtain a copy of the extract and to ensure entry of Shendure's name against Plot No. 78 is correct, or whether he made out all this story and, in fact, paid the sum of Rs. 150/- to the appellant in addition to the previous sum of Rs. 50/- for the purchase of small savings certificates for Shendure. The evidence of Thakur has been given on oath in support of the prosecution version, while, on the other side, there is no evidence except that the appellant made his statement, under Section 312 of the Code of Criminal Procedure, giving his version. The High Court believed the evidence of Thakur and, in our opinion, very rightly, because there were a number of circumstances which showed that his version must be correct, while the plea put forward by the appellant cannot be true.

6. The circumstances which corroborate Thakur and show that his version must be correct are:—

(1) The appellant, in January, 1964, informed Thakur that Shendure's name had already been entered, but gave wrong information to Thakur that the name had already been entered, while he kept the entries open by not entering Shendure's name against Plot No. 78. His plea that he kept the entries open for the purpose of demanding money for small savings scheme from January, 1964, till December, 1964, under the instructions from superior authorities has been found to be entirely wrong.

(2) No receipt was given by the appellant to Thakur when he received the sum of Rs. 150/- from him. If the money was really received for purchase of small savings certificates, the appellant would surely have given a receipt to Thakur when he accepted this money for that purpose. The absence of the receipt is only consistent with the acceptance of this money as a bribe.

(3) When the appellant obtained this sum of Rs. 150/- from Thakur, he did not ask Thakur to give an application signed by Shendure for purchase of small savings certificates. Earlier, the application for purchase of small savings certificates of the value of Rs. 50/- had already been returned by the Post Office on the ground that

it required the signature of Shendure. In case, the appellant was really taking this sum of Rs. 150/- for purchase of small savings certificates, he, in the light of that earlier experience, would have certainly insisted on taking a written application from Shendure for purchase of the certificates, because, if no such application was given subsequently by Shendure, the appellant would have been forced to return this money and would have failed to utilise it for the purpose of purchasing the certificates. If such application had been obtained, the appellant could have produced it as proof that the money was received not as a bribe, but for the purpose mentioned by him. The absence of such an application is a very strong circumstance showing that the sum was not received for purchase of certificates, but as a bribe as stated by Thakur.

(4) On the very first occasion when the appellant was questioned by his superior authorities, he did not come forward with the explanation that the sum of Rs. 150/- was received by him for purchase of small savings certificates; and this plea was taken only as an after-thought.

(5) This sum of Rs. 150/- was accepted by the appellant not at his own house or office, but at the house of a third person, viz., the Inamdar. If the money was being received for small savings certificates, he would have obviously accepted the money at his own place of work; and

(6) Nothing has been established on the record to show that Shendure had any enmity with the appellant, so that he could have no motive to make out a false case of bribery against the appellant. Shendure, even according to the appellant, is a rich man and it cannot be expected that he would try to make out a false case simply because a small sum of Rs. 200/- was demanded from him by the appellant for purchase of small savings certificates

7. On the other hand, there are no circumstances established from the evidence on the record which are inconsistent with the prosecution case and which would show that this sum of Rs. 150/- could not have been paid as a part of the bribe of Rs. 200/- demanded by the appellant. The appellant's case that on the 3rd December, 1964, when there were negotiations between him and Thakur, the meeting took place not in the witness shed of the Court but in the room of the Sheristedar has been rightly rejected by the High Court. The trial Court wrongly accepted this plea, purporting to

rely on some admission made by Thakur which was only to the effect that defence witness Kulkarni used to sit in the Sheristedar's room. There was no admission by Thakur indicating that the meeting between him and the appellant took place in that room. There is the further circumstance that the version of the talk put forward by the appellant in his statement under Section 342, Criminal Procedure Code, is different from the version given by the defence witness Kulkarni in his evidence. Kulkarni says that, in the talk in his presence the only question that arose was of the appellant giving an extract from the records to Thakur if Thakur paid the money for purchase of small savings certificates, while, according to the appellant, he had told Thakur on that very occasion that the entry had been kept blank and that Dundappa's application had been received by him claiming that his name should be entered and not Shendure's.

8. In these circumstances, the High Court was quite right in holding that the trial Court went wrong in accepting the plea of the defence and in rejecting the prosecution case. There is no reason for our interference with the judgment of the High Court. The appeal is dismissed.

Appeal dismissed.

1970 CRI. L. J. 510 (Vol. 76, C. N. 119) =
AIR 1970 SUPREME COURT 359
(V 57 C 77)

S. M. SIKRI AND P. JAGANMOHAN
REDDY, JJ.

Kantilal Chandulal Mehta, Appellant
v. State of Maharashtra and another, Respondents.

Criminal Appeal No. 260 of 1968, D/-
10-10-1969.

(A) Criminal P. C. (1898), Secs. 423 (1) (d), 535, 231 — Charge can be altered at appellate stage — Charge altered and case remanded for fresh argument — Accused given opportunity to adduce evidence — No new trial — No prejudice — Constitution of India, Article 136 — Supreme Court will not interfere with judicial exercise of discretion.

The Criminal Procedure Code gives ample power to the Courts to alter or amend a charge whether by the Trial Court or by the appellate Court provided that the accused has not to face a charge

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for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him. The power of the appellate Court is set out in Section 423, Criminal Procedure Code and invests it with very wide powers. A particular reference may be made to Cl. (d) of sub-section (1) as empowering it even to make any amendment or any consequential or incidental order that may be just or proper. Apart from this power of the appellate Court to alter or amend a charge, Section 535, Criminal Procedure Code further provides that no finding or sentence pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed unless the Court of appeal or revision thinks that the omission to do so has occasioned failure of justice and if in the opinion of any of these Courts a failure of justice has been occasioned by an omission to frame a charge, it shall order a charge to be framed and direct that the trial be recommenced from the point immediately after the framing of the charge. AIR 1913 PC 192, Rel. on.

(Para 3)

Held that what the appellate Court did was to amend the charge and remand the case, but did not intend nor did it direct a new trial, but only an opportunity was given to the accused to safeguard himself against any prejudice by giving him an opportunity to recall any witnesses and adduce any evidence on his behalf. The offence with which the accused was charged alternatively was the same namely under Section 406, Indian Penal Code. The entire transaction was one and indivisible inasmuch as he was not only required to answer the charge of misappropriation of money but in the alternative misappropriation of goods which the complainant contended became theirs as soon as the accused purchased them with the moneys it advanced which were alleged to have been misappropriated. No prejudice could be said to have been caused or was likely to be caused to the accused by the amendment of the charge, so as to include misappropriation of goods.

(Para 4)

The Supreme Court would not interfere with the judicial exercise of discretion of the Judge in framing the charge and in giving the accused an opportunity to recall any witnesses or adduce fresh evidence on his behalf. If no objection

could be taken to the trial Court in framing the original charge it is difficult to see how an objection can be taken before the Supreme Court to the framing of an alternate charge on the same allegation in the complaint.

(Para 5)

(B) Constitution of India, Article 136 — No ground taken in special leave petition — Cannot be allowed to be raised in argument.

(Para 5)

Cases Referred: Chronological Paras (1913) AIR 1913 PC 192 (V 30) =

70 Ind App 196, Thakur Shah v.

Emperor

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The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.:— This appeal is by special leave against the order of the High Court of Bombay dated the 18th October, 1968, allowing the oral application of the learned advocate for the respondent for the amendment of the charge in terms of the draft submitted by him and directing the Chief Presidency Magistrate to assign the case to some Court for holding a new trial in respect of the amended charge. This order was made in the following circumstances:

The appellant was one of the partners of a firm Chandulal Kanji & Co. along with his brother Chandulal K. Mehta. By and under an agreement called the Packing Credit Agreement entered into between the firm and the second respondent, the Union Bank of India, the appellant obtained 75 per cent of the value of groundnut extraction to be purchased by the firm and exported to the United Kingdom and other European countries from the Bank on the condition that immediately after the purchase of the goods and its export the shipping documents would be sent to it. This arrangement required the firm while sending a letter requesting the credit to be given to it, to enclose the contract of sale of groundnut extraction entered into between it and the foreign firm. On receipt of this letter and the agreement the bank would advance 75 per cent of the money required to purchase the groundnut extraction. After the amount was received, goods had to be purchased from the mills and shipped for export and the shipping documents sent to the Bank within a month from the date of such advance. It appears that under this arrangement the second respondent Bank had advanced under the Cash Credit Agreement and the Packing Credit Agreement nearly rupees

4 lacs on several dates the first of which was March 27, 1965, which was for the purchase of 200 tons of groundnut extraction and with which we are now concerned. The Cash Credit Agreement, the Packing Credit Agreement and the letter requesting the advance of Rs. 60,000/- were all signed on the same date. The advance, as requested, was also made on the 27th March, 1965. Goods were purchased but could not be shipped within a month from the date of the advance because, as stated in the letter of the appellant dated the 27th April, due to change in the schedule of departure of the ships it was not possible to export the goods on the 24th or 25th March as originally planned as such he undertook to ship the goods within a week thereafter. On the same day, the appellant further sent a declaration that the firm had purchased 300 tons from the advance made to it and is holding the stock. On the 6th May the Bank requested the firm to forward the shipping documents in respect of the seven agreements of which one related to the agreement of 27th March. When the shipping documents were not sent to it in conformity with the several documents the bank made certain enquiries from its branch in Veraval, a port in Kathiawar and received certain information as to the dates on which the various quantities were exported and the ships in which they were sent. As the shipping documents were not sent to the second respondent as required under the agreements entered into with it, it again called on the firm on the 24th May to hand over the documents to it in respect of the groundnut exported. When this request was not complied with, it filed a complaint against the appellant who alone was the active partner of the firm, in the Court of the Presidency Magistrate on the 26th May, alleging against him misappropriation of moneys and goods contrary to the agreement. In support of this complaint the manager of the Bank gave evidence and at the stage of framing the charge the Magistrate heard the lawyers for both sides. He framed only one charge against the accused for misappropriation of the moneys under Section 406, Indian Penal Code advanced by the Bank in respect of which the Magistrate ultimately convicted him on 31st August, 1966 and sentenced him to 18 months' rigorous imprisonment. Against this conviction the appellant appealed to the High Court and when the case came up for hearing and had been

argued for a considerable length, the advocate for the complainant, the second respondent, appears to have made an oral application for amending the charge framed by the Magistrate as per the draft handed over to the learned Judge which was to be added as an alternative charge to the charge already framed. It was contended that the Magistrate had framed a charge merely in respect of the entrustment of the moneys that were advanced by the Bank to the appellant but even so the evidence had been led on behalf of the complainant at the trial to show that apart from the money with which the appellant was said to have been entrusted with, even the goods that were purchased by the appellant with the moneys so advanced had also been entrusted to him and which he had agreed to hold on account of the Bank. This prayer was opposed by the learned Advocate for the appellant who contended that it was open to the complainant to have urged the Magistrate at the time when the charge was being framed to have an alternate charge similar to the one now required to be added. In fact it was stated by the learned advocate that the charge was actually framed by the Magistrate after substantial evidence of the complainant had been recorded by him and after the complainant's advocate in the lower Court had discussions on the question of the framing of charge, but in spite of it only one charge was framed against the appellant for breach of trust in respect of moneys said to have been entrusted to the appellant by the Bank. The charge relating to goods was omitted and not framed. It was also pointed out that the altering or amending of charge at this stage would really amount to the framing of a totally new charge in regard to altogether a new subject-matter, namely, alleged entrustment of goods, which if permitted would prejudice the accused in his defence. The learned Judge, however, after hearing these arguments thought that a charge which would include entrustment of moneys as well as entrustment of goods ought to have been framed by the Magistrate but having regard to the materials which have already been brought on record by the complainant at the trial he thought that it was desirable in the interest of justice to allow the amendment. The following directions given by the learned Judge are relevant for the determination of the contention urged before us:

"I direct that the charge as framed by the learned Magistrate be altered and amended in terms of the draft amendment submitted and send the case back for a new trial on this amended charge so as to enable the appellant to have full opportunity to meet this case, till which time this appeal is kept pending.

I direct that the papers be sent to the learned Chief Presidency Magistrate forthwith and the learned Chief Presidency Magistrate is further directed to assign the case to some Court for holding the new trial. I further direct that the new trial should be expeditiously completed and preferably within two months from the receipt of the papers by the Court to which the case would be assigned by the learned Chief Presidency Magistrate.

The other two appeals being Criminal Appeals Nos. 1162 and 1163 of 1966 should also be adjourned as part-heard matters and to be put up along with Criminal Appeal No. 1161 of 1965 after the record and the proceedings of the new trial is received by this Court."

2. Mr. Chari on behalf of the appellant construing the above order as a direction for a new trial without disposing of the appeal contends that it is unwarranted, unfair, inequitable and unsupported by any of the provisions of the Code of Criminal Procedure. The learned advocate further submits that it is grossly prejudicial to the accused, for the prosecution to wait till the end of the trial and then say that the charge should be amended. It could have easily insisted at the stage of framing the charge itself that an additional charge should be framed and if the prayer was not accepted it could have come in revision. The prosecution having let the trial proceed to the end without insisting on any additional charge cannot now before an appellate Court ask for its amendment nor should the said amendment be permitted. Secondly, he submits that the learned Judge did not consider the question whether there was or was not a prima facie case of entrustment of goods. In fact it is the contention that the cumulative effect of the agreement and the transaction between the appellant and the second respondent Bank does not disclose entrustment of moneys to sustain the charge for which the appellant was convicted and if there can be no question of any entrustment of moneys there can be no entrustment of goods. The learned Judge, it is stated should have adverted his mind

to this aspect of the case before he permitted the framing of additional charge and directed the Magistrate to hold a new trial. In fact the learned advocate urged that before the Magistrate the second respondent's advocate had specifically stated that the trial should proceed only on one charge relating to entrustment of moneys as a test case and having taken up this position no prayer for the addition of another charge can be made or ought to have been granted. But Shri Tarkunde appearing on behalf of the second respondent denies that there was any such submission and contends that in fact Tulzapurkar, J., did not direct a new trial as suggested by the advocate on behalf of the appellant though the use of the words "new trial" has unhappily given rise to such a contention. What in fact the learned Judge did was to send the case back to the Magistrate to enable the appellant to have full opportunity to meet the case and return the record to the Court to enable it to dispose of the appeal on both the charges. The learned advocate submits that there is no illegality in the order of the learned Judge because what the appellate Court could have done itself it is directing the Magistrate to do, namely, to give an opportunity to the accused to call the prosecution witnesses if he so desires, obtain his statement under Section 342 in respect of the additional charge and to allow him to record any evidence on his behalf if he is so desirous. It appears to us that the contention of Shri Tarkunde is amply justified by the following observations of the learned Judge allowing the application for amendment made by Mr. Patel on behalf of the second respondent:

"I have therefore asked Mr. Khambata as to whether the appellant would like to have an opportunity of a new trial where he could meet this case and Mr. Khambata has stated that the proper course for the Court, after allowing amendment of the charge in the manner sought by the complainant, would be to order a new trial. Mr. Patel for the complainant, however, has stated before me that even during such new trial that would be ordered by the Court, no fresh evidence would be led on behalf of the complainant and the complainant would be relying upon the self-same material that has already been brought on record by the complainant at the trial, which is already concluded.

Mr. Khambata also urged before me that if I were inclined to allow the

application of Mr. Patel, I should dispose of the appeal which deals with the alleged entrustment of the monies and either accept the findings or set aside the findings and thereafter order a new trial in regard to the alleged entrustment of the goods. I feel that it would be desirable and proper to keep this pending till the opportunity that is being given to the appellant-accused No. 2 to meet this new case is fully availed of by him and the record of such new trial is received by this Court.

I accordingly allow the application of Mr. Patel for amendment of the charge in terms of the draft submitted by him. From the above observations it would be clear that the learned Judge did not intend that the trial should be a new trial in the sense that the Magistrate would record the evidence afresh, see whether there was a prima facie case for framing a charge and if there was, to frame a charge, then permit the complainant to lead evidence, record the statement of the accused under S. 342 and adduce evidence on his behalf after which he would pronounce judgment of conviction or acquittal. If he had so intended and had directed a totally new trial as is alleged, he could not have rejected the contention of Shri Khambata for the appellant that he should dispose of the appeal and order a new trial on the additional charge nor would he have directed that the appeal should be kept pending till the record of the new trial is received back in his Court which could only be after giving the accused appellant an opportunity to meet the case on the additional charge.

3. On this interpretation of the order the question is whether what has been directed by the learned Judge is in conformity with the provisions of the Code of Criminal Procedure. In our view the Criminal Procedure Code gives ample power to the Courts to alter or amend a charge whether by the trial Court or by the Appellate Court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him. The power of the Appellate Court is set out in Section 423, Criminal Procedure Code and invests it with very wide powers. A particular reference may be made to Cl. (d) of sub-section (1) as empowering it even

to make any amendment or any consequential or incidental order that may be just or proper. Apart from this power of the Appellate Court to alter or amend a charge, Section 535, Criminal Procedure Code further provides that no finding or sentence pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed, unless the Court of appeal or revision thinks that the omission to do so has occasioned failure of justice and if in the opinion of any of these Courts a failure of justice has been occasioned by the omission to frame a charge, it shall order a charge to be framed and direct that the trial be recommenced from the point immediately after the framing of the charge. The wide and extensive power which an appellate or revisional Court can exercise in this regard has also the support of the Privy Council. Lord Porter who delivered the opinion of the Judicial Committee in *Thakur Shah v. Emperor*, AIR 1943 PC 192 had occasion to point out that while the history of the growth of Criminal Law in England, its line of development and the technicalities consequent thereon would have made it more difficult, and may be impossible, to justify a variation of the charge, Indian Law was subject to no such limitation but is governed solely by the Penal Code and Criminal Procedure Code. In that case the Privy Council was called on to decide whether the alteration of the charge and the conviction from one of abetment of forgery by known person or persons to abetment of forgery by an unknown person or persons vitiated the conviction. It was held that it did not, because an Appellate Court had wide powers conferred upon it by S. 423 and in particular by sub-s. (1) (d) of that Section, which is "always of course subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made against him or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred."

4. In this case Shri Chari contends that (1) what the High Court should have done, if it found that interest of justice required it, either to have recorded the evidence itself or to have asked the trial Court to record it and send it back, but it cannot refuse to give a finding on the charge for which he was convicted and (2) that the prosecution having proceeded with the trial on the charge

framed and not having asked for an amendment at that stage cannot ask the appellate Court to amend or add to the charge. It appears to us that both these contentions are based on a misreading of the order of the High Court. As already pointed out the learned Judge of the High Court did not intend nor did he direct a new trial in the sense that it is contended he had done. There was in fact no retrial directed, but only an opportunity was given to the accused to safeguard himself against any prejudice by giving him an opportunity to recall any witnesses and adduce any evidence on his behalf. The appellant has also understood the order not as a retrial is clear from ground (f) of the Special Leave Petition filed before us. It is therefore not necessary for us to examine the scope and extent of the power or circumstances in which a retrial should be ordered. The complainant's Advocate Shri Tar-kunde in fact said and even now submits before us that he does not want to lead any evidence and would be satisfied on the same evidence to sustain a conviction on the amended charge, nor does the alternative charge now framed requires him to answer a charge against him of a new offence which would cause prejudice. The offence with which he is now charged alternatively is the same namely under Section 406 but as the entire transaction was one and indivisible he is not only required to answer the charge of misappropriation of money but in the alternative misappropriation of goods which the complainant Bank contends became theirs as soon as the accused purchased them with the moneys it advanced. In our view no prejudice is caused or is likely to be caused to the accused by the amendment of the charge as directed by the High Court.

5 It was again contended that the High Court ought to have considered whether there was a prima facie case against the accused to justify the framing of the amended charge particularly when it took the view that the first charge could not be sustained. We do not think the learned Judge expressed any view as to the maintainability or otherwise of the conviction, but thought there should have also been framed an alternate charge in respect of the goods. It is true that the Court did not give any reasons as to why it thinks there was a prima facie case, but being an Appellate Court perhaps it was anxious to avoid giving an impres-

sion that it has taken any particular view of the evidence. The accused raised no ground on this account in the Special Leave Petition, nor do we think on this account we should interfere with the judicial exercise of discretion of the learned Judge in framing the charge and in giving the accused an opportunity to recall any witnesses or adduce fresh evidence on his behalf. If no objection could be taken to the trial Court in framing the original charge it is difficult to see now an objection can be taken at this stage to the framing of an alternate charge on the same allegation in the complaint.

6. The appeal is accordingly dismissed.

Appeal dismissed.

1970 CRI. L. J. 515 (Vol. 76, C. N. 120) =
AIR 1970 SUPREME COURT 366
(V 57 C 79)
(From Delhi)

S. M. SIKRI, G. K. MITTER AND
JAGANMOHAN REDDY, JJ.

Ram Dayal, Appellant v. Municipal Corporation of Delhi and another, Respondent.

Criminal Appeal No. 80 of 1968, D/- 7-10-1969.

Prevention of Food Adulteration Act (1954), Section 13 — Criminal P. C. (1898), Sections 510 (2), 257 — Report of Public Analyst — Accused has right to call Public Analyst to be examined and cross-examined — The fact that certificate of Director of Central Laboratory supersedes report of Public Analyst and is conclusive and final does not limit this right of accused.

Where certificates are not made final and conclusive evidence of the facts stated therein, it will be open to the party against whom certificates which are declared to be sufficient evidence, either to rebut the facts stated therein by his own or other evidence or to require the expert to be produced for cross-examination which prayer the court is bound to consider on merits in granting or rejecting it. There is no presumption that the contents are true or correct though such certificate is evidence without formal proof. In any case where there is evidence to the contra the court is bound to consider that evidence along with such a certifi-

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cate with or without the evidence of the expert who gave it being called and come to its own conclusion. It is true that sub-section (2) of Section 13 of the Act has given a right both to the accused as well as the complainant on payment of the prescribed fee to apply to the Court after the prosecution has been instituted to send part of the sample preserved as required under sub-clause (i) or sub-cl. (iii) of Clause (c) of sub-section (1) of Section 11 to the Director of the Central Laboratory for a certificate, and the Court is bound to send it under its seal to the said Director who has to submit a report within one month from the date of the receipt. This certificate under sub-section (3) supersedes the Public Analyst's certificate and is conclusive and final under sub-section (5). But nothing contained in these sub-sections relating to certificate of the Director of the Central Food Laboratory in any way limits the right of the accused under Section 257 of the Code of Criminal Procedure to require the Public Analyst to be produced. The court may, reject the prayer for good and sufficient reasons such as for instance where it is made for the purpose of vexation or delay or for defeating the ends of justice. AIR 1966 SC 128 and Cri. Appeal No 161 of 1966, D/- 3-5-1968 (SC), Relied on. (Para 4)

Where the accused was prosecuted for selling Laddos which were alleged to have been adulterated with unpermitted colour and the accused knew what colour he had added and could have easily said that the colour was the permitted one but did not say so in his examination under Section 342, Criminal P. C. and he did not even make an application under Section 13 (a) calling for the report of the Director of Central Laboratory, and did not make even before the Supreme Court any attempt why the evidence of the Public Analyst was required and what was the specific point which needed to be elucidated. Held that the application for examination of the Public Analyst was made mere to delay the disposal of the case. (Para 7)

Cases Referred: Chronological Paras

- (1968) Cri Appeal No 161 of 1966,
D/- 3-5-1968 (SC), Sukhmal Gupta
v. Corporation of Calcutta 6
(1966) AIR 1966 SC 128 (V 53) =
1965-2 SCR 894 = 1966 Cri LJ
106, Mangaldas Raghavji v. State
of Maharashtra 5

The following Judgment of the majority was delivered by

JAGANMOHAN REDDY, J.: This appeal by certificate granted by the Delhi High Court under Article 134 (1) (c) of the Constitution is against its judgment which confirmed the conviction of the accused of an offence under Section 9 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) and against the enhancement of the sentence of imprisonment from the one till the rising of the court to six months R. I. which is the minimum prescribed under the Act together with a fine of Rs 1,000 in default to undergo six months R. I.

2. The appellant is a sweetmeat seller. It is alleged that on September 1, 1965, Shri B. S. Sethi, Food Inspector appointed by the Central Government under Section 9 of the Act visited his shop and found that the appellant was selling coloured laddus. The Food Inspector purchased 1,500 grams of these laddus by way of a sample by paying him Rs. 9 as the price thereof. This sample was subdivided into three parts and was put into three separate bottles as required under Section 11 of the Act. One bottle was given to the accused, another was sent to the Public Analyst and the third was retained by the Food Inspector. The sample sent to the Public Analyst was analysed and a report was received from him on September 10, 1965 to the effect that the laddus were adulterated with unpermitted colour. Thereupon a complaint was filed against the accused and he was convicted by the Magistrate on October 17, 1966 and sentenced to imprisonment till the rising of the court and to pay a fine of Rs 1,000, in default to undergo six months' R. I. It would appear that the Municipal Corporation filed before the Sessions Judge a revision for the enhancement of the sentence because the accused having been found guilty under the provisions of Section 7 read with Section 16 of the Act should have been awarded the minimum sentence of six months and a fine of Rs 1,000 but instead he was sentenced to imprisonment till the rising of the court and a fine of Rs 1,000 which was not in accordance with the mandatory provisions of S. 16 of the Act. The Sessions Judge, after hearing the parties accepted the contention of the Municipality and referred the case to the High Court recommending that the accused having been found guilty under the provisions of Section 16 of

frame of the Act should have been awarded a minimum sentence of six months and a fine of Rs. 1,000/-. Before the High Court several contentions were raised on behalf of the accused one of which was that as his request for summoning the Public Analyst for cross examination had not been acceded to, he had been prejudiced, as such the entire proceedings against him were vitiated. The High Court however rejected this contention on the ground that Section 510 of the Code of Criminal Procedure had no application in that it only dealt with the Chemical Examiner or an Assistant Chemical Examiner and other experts mentioned therein. It was also observed that where the accused desired to challenge the report of the Public Analyst under the Act, he had to follow the procedure provided in Section 13 (2) for sending the sample to the Director of Central Food Laboratory for his examination, because any report given by him will supersede the report of the Public Analyst and would be final and conclusive as to the facts stated therein. Before us also a similar contention was urged by the learned Advocate for the accused Shri Hardev Singh who had produced before us the application made on behalf of the accused under Section 510 (2) for calling the Public Analyst which was summarily rejected on 28th August 1966. This contention urged before us has to be determined in the light of the relevant provisions of the Act.

3. It cannot be disputed that any person selling food with impermissible colouring matter contravenes the provisions of Section 7 which prohibits the selling of any adulterated food and would be punishable under Section 16 of the Act. What is adulterated article of food has been defined in Section 2 (i) and so far as it is related to colouring, sub-cl. (j) of Clause (i) of Section 2 provides that an article of food shall be deemed to be adulterated "if any colouring matter is used other than that prescribed in respect of the article and in amounts not within the prescribed limits of variability is present in the article". Rules 23 and 27 of the Prevention of Food Adulteration Rules, 1955 prohibit the addition of any colouring matter except permitted by the Rules, and of inorganic colouring matters and pigments to any article of food. What is permitted and to what extent has been stated in Rules 24 to 26 and 28 to 31, but in so far as this case is concerned we may merely refer to Rules 26 and 28

the former of which gives a list of natural colouring matters that can be used and the latter with coal tar dyes. We are told that the Laddus which were being sold by the accused had yellow colour. If so, item 2 of Rule 28 prescribes that the only permitted colours are Tartrazine with colour index 640 belonging to Chemical class of Xanthene and Sunset Yellow FCF belonging to the chemical class Azo, and these alone can be used. It will therefore be incumbent on the Public Analyst to say whether the colour used is that which is permissible under any of the rules and if as in the report he has stated that the sample of the Laddus purchased by the Food Inspector was coloured with unpermitted colour, it would mean that the accused has not used any of the colours permitted under the rules. The report of the Public Analyst is as follows:—

"Butyro Refractometer reading at 40°C of the fat extracted from sweets-50.0
Baudouin test of the extracted fat —
Positive Reichert value of the extracted fat 7.59 Colour — unpermitted.

1 1 1 the same is adulterated due to 7.0 excess in Butyro Refractometer reading at 40° C of the fat extracted from sweets, 20.41 deficiency in Reichert value of the extracted fat, Baudouin test of extracted fat being positive, and also coloured with unpermitted colour."

4. The learned Advocate for the accused submits that the refusal of the court to grant the application of the accused to call the Public Analyst Shri Sudhama Rao for cross-examination has greatly prejudiced him, as such the conviction ought to be quashed. It is contended that the accused has a valuable right of cross-examination to test the contents of the report given by the Public Analyst and the court has to summon him if so desired. On the other hand it is contended both by Shri Bishan Narain for the Delhi Municipality as well as Dr. Singhvi for the Union of India that no such right has been conferred under the Act when the provisions of S. 13 (5) have not only made the document signed by the Public Analyst to be used in evidence of the facts stated therein in any proceedings under the Act or under Sections 272 to 276 of the Indian Penal Code but has given a right to the accused to have the sample sent to the Director of the Central Food Laboratories under S. 13 (2) whose report supersedes that of the Public Analyst and is final and conclusive. In

view of these provisions it is said that the legislature inferentially took away the right of the accused to summon the Public Analyst either for examination or cross examination, as such the analogy of Section 510 (2) of the Criminal Procedure Code which specifically gives a right to summon and examine the chemical examiner and other experts therein stated, as to the subject matter of their respective reports has no relevance. Dr. Singhvi further contends that there are a class of cases which permit of trials by certificates where the general rule of evidence that every document in order to be admissible has to be proved by the person signing it has no application as the statute permits it to be proved without calling the author of it. While it cannot be disputed that there are certain classes of cases where certificates have been treated as conclusive evidence, there were yet others though admissible without calling the functionaries that gave them were none the less only prima facie evidence. In cases where the certificates are not to be treated as conclusive evidence and they are only prima facie evidence, the party against whom they are produced has a right to challenge the subject matter of the certificate. The statutes have also in some cases recognised this right, such as for instance in sub-section (2) of Section 510 Criminal Procedure Code in respect of reports given under the hand of several experts named in sub-section (1) notwithstanding the fact that they may be used in evidence in enquiry trial or other proceedings under the Code. Sub-section (2) provides: "The court may if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the subject matter of the report." Similarly sub-section (1) of Section 110 of the English Food and Drugs Act, 1955 while providing that the production by one of the parties of the certificate of a Public Analyst in the form prescribed in Section 92 (5) or of a document supplied to him by the other party as being a copy of such certificate shall be sufficient evidence of the facts stated therein unless in the first mentioned case the other party requires that the analyst shall be called as a witness. Sub-section (2) of Section 110 also gives a like opportunity in the case of a certificate of an officer who took a sample of the milk. It appears to us that where certificates are not made final and conclusive evidence of the facts stated therein, it

will be open to the party against whom certificates which are declared to be sufficient evidence either to rebut the facts stated therein by his own or other evidence or to require the expert to be produced for cross-examination which prayer the court is bound to consider on merit in granting or rejecting it. There is no presumption that that contents are true or correct though such a certificate is evidence without formal proof. In any case where there is evidence to the contrary the court is bound to consider that evidence along with such a certificate with or without the evidence of the expert who gave it being called and come to its own conclusion. It is true that sub-section (2) of Section 13 of the Act has given a right both to the accused as well as the complainant on payment of the prescribed fee to apply to the court after the prosecution has been instituted to send part of the sample preserved as required under sub-clause (i) or sub-cl. (iii) of Clause (c) of sub-section (1) of Section 11 to the Director of the Central Laboratory for a certificate, and the court is bound to send it under its seal to the said Director who has to submit a report within one month from the date of the receipt. This certificate under sub-section (3) supersedes the Public Analyst's certificate and is conclusive and final under sub-section (5). But nothing contained in these sub-sections relating to certificate of the Director of the Central Food Laboratory in any way limits the right of the accused under Section 257 of the Code of Criminal Procedure to require the Public Analyst to be produced. The court may, as we said earlier, reject the prayer for good and sufficient reasons such as for instance where it is made for the purpose of vexation or delay or for defeating the ends of justice.

5. In *Mangaldas Raghavji v. State*, 1965-2 SCR 894 = (AIR 1966 SC 128) this Court held that where the accused had not done anything to call the Public Analyst the court could legally act on the report of the Public Analyst. Mudholkar, J speaking for the court observed at p. 900 (of SCR) = (at p. 132 of AIR).

"It is true that the certificate of the Public Analyst is not made conclusive but this only means that the court of fact is free to act on the certificate or not as it thinks fit."

Again at p 902 (of SCR) = (at p. 132 of AIR) it was said, "As regards the failure to examine the Public Analyst as a witness in the case no blame can be laid

on the prosecution. The report of the Public Analyst was there and if either the court or the appellant wanted him to be examined as a witness appropriate steps would have been taken. The prosecution cannot fail solely on the ground that the Public Analyst had not been called in the case."

6. In *Sukhmal Gupta v. Corporation of Calcutta* (unreported, Criminal Appeal No. 161 of 1966, D/- 3-5-1968 (SC)) the Assistant Public Analyst who had analysed the sample was examined and was cross examined by the defence. It was contended that the Public Analyst was not called. There does not appear to have been any attempt to have him called, nor was any prejudice shown. On the other hand, the accused could have availed of the valuable right given to him under Section 13 (2) but he did not do so, nor did he put any question in cross-examination that the tea was liable to deterioration and could not be analysed by the Director of Central Food Laboratory. In these circumstances the evidence of the Assistant Public Analyst and the report of the Public Analyst were accepted in maintaining the conviction.

7. In this case we would have remanded it to give the accused an opportunity to examine the Public Analyst, but it appears to us that even before us no attempt was made as to why the evidence was required and what is the specific point which needs to be elucidated. The accused knows what colour he added, he could have easily said that that colour was one of the permitted colours, but he did not say so in his examination under Section 342, nor did he produce any evidence of those whom he employed as to the colour which was added. In our view, the application was made merely to delay the disposal of the case otherwise he could have easily made an application under Section 13 (a) as soon as a complaint was lodged against him on 9th January 1966 which was within 3½ months from the purchase of the sample and the receipt of the report. There is nothing to show that either the Laddus or the colour would have deteriorated even if he had made his application under Section 13 (2) when he made the application under Section 510 (2) on 29th August 1966.

8. In these circumstances, we do not consider this to be a fit case for inter-

ference. The appeal is accordingly dismissed.

Appeal dismissed.

1970 CRI. L. J. 519 (Vol. 76, C. N. 121) =

AIR 1970 SUPREME COURT 436

(V 57 C 95)

(From: Rajasthan)*

S. M. SIKRI, G. K. MITTER AND
K. S. HEGDE, JJ.

Madan Raj Bhandari, Appellant v. The State of Rajasthan, Respondent.

Criminal Appeal No. 82 of 1967, D/- 29-7-1969.

Criminal P. C. (1898), Sections 237, 238 — Accused charged under Section 314 read with Section 109, Penal Code for abetting R to cause miscarriage of A — At no stage he was notified that he would be tried for offence of having abetted A — Throughout the trial accused was asked to defend himself against the charge on which he was tried — Conviction for abetting A to cause miscarriage, held, not proper — Accused was likely to have been prejudiced by charge on the basis of which he was tried — (Penal Code (1860), Sections 314, 109). Cr. App. No. 219 of 1965, D/- 15-3-1967 (Raj), Reversed. (Para 14)

Cases Referred: Chronological Paras

(1959) AIR 1959 SC 673 (V 46)=

(1959) 2 Supp SCR 1=1959 Cri LJ 917, Faguna Kanta Nath v. State of Assam 14

(1958) AIR 1958 SC 813 (V 45)=

1959 SCR 861=1958 Cri LJ 1352, Gallu Sah v. State of Bihar 14

(1956) AIR 1956 SC 116 (V 43)=

1955-2 SCR 1140=1956 Cri LJ 291. Willie (William) Slaney v. State of M. P. 14

(1939) AIR 1939 PC 47 (V 26)=

40 Cri LJ 364, Pakala Narayan Swamy v. Emperor 11

(1924) AIR 1924 Cal 1031 (V 11)=

ILR 52 Cal 112=26 Cri LJ 11, Umadasi Dasi v Emperor 14

M/s. Sobhag Mal Jain and V. S. Dave, Advocates, for Appellant, Mr. K. B. Mehta, Advocate, for Respondent.

The following Judgment of the Court was delivered by

(*Criminal Appeal No. 219 of 1965, D/- 15-3-1967 — Raj.)

LM/AN/E10/69/LGC/M

HEGDE, J.:— The appellant's conviction by the learned Additional Sessions Judge, Jodhpur under Section 314 read with Section 109, Indian Penal Code, having been affirmed by the High Court of Rajasthan, he appeals to this Court after obtaining special leave. The charge on the basis of which he was tried was that some days prior to May 1, 1963, he abetted one Mst. Radha at Jodhpur to cause the miscarriage of one Miss Atoshi Dass alias Amola who as a result of administration of tablets and introduction of "laminaria dento" by the said Mst. Radha, died on May 1, 1963. The case for the prosecution is that in about the year 1962-63, the appellant was the President of Oramotthan Pratishthan at Jalore. Miss Atoshi Dass was a teacher working in Indra Bal Mandir, Tikhi, an institution under the management of appellant. She was young and unmarried. Illicit relationship developed between the aforementioned Atoshi Dass and the appellant as a result of which Miss Atoshi Dass became pregnant. With a view to cause abortion of the child in her womb, the appellant took Miss Dass to Jodhpur and there attempted to cause the miscarriage mentioned above through one Mst. Radha. The attempt was not successful. The insertion of "laminaria dento" in the private parts of Miss Dass caused septicaem as a result of which she died in the hospital on May 1, 1963.

2. The appellant's case is that he had no illicit relation with Miss Atoshi Dass nor did he abet the alleged abortion. He denies that Miss Atoshi Dass died as a result of any attempt at abortion.

3. As seen earlier the appellant was charged and tried for the offence of abetting Mst. Radha to cause the miscarriage in question but he was ultimately convicted of the offence of abetting Miss Dass in the commission of the said offence.

4. It may be stated at this stage that one Mst. Radha was tried along with the appellant in the trial Court but she was acquitted on the ground that there was no evidence to show that she had anything to do with the abortion complained of.

5. Despite the contentions of the appellant to the contrary, we think there is satisfactory evidence to show that the death of Miss Dass was due to septicaem resulting from the introduction of "laminaria dento" into her private parts. On this point we have the unimpeachable evidence of Dr. A. J. Abraham, P. W. 4.

6. There is also satisfactory evidence

to show that the appellant was in terms of illicit intimacy with Miss Dass. It is true that the principal witness on this point is Miss Chhayadass, P. W. 6, the sister of the deceased, a witness who has given false evidence in several respects. But as regards the illicit relationship between the appellant and Miss Atoshi Dass her evidence receives material corroboration from the evidence of P. W. 7, M. Sen and P. W. 5, Misri Lal. Further also accords with the probabilities of the case. It is not necessary to go into the question at length as we have come to the conclusion that the appellant is entitled to an acquittal for the reasons to be stated presently.

7. While we are of opinion that there was illicit intimacy between the appellant and the deceased, we are unable to accept the assertion of Miss Chhayadass that the appellant was her only paramour. Exh. D-3 conclusively proves that the deceased had illicit relationship with one Sood at Delhi. In the committal Court Miss Chhayadass admitted that the address on Exh. D-3 is in the handwriting of the deceased. In that Court she was positive about it; but in the trial Court she went back on that admission. In many other respects also she had deviated from the evidence given by her in the committal Court. Hence we are unable to accept her statement in the trial Court that the address found on Exh. D-3, an inland letter is not in the handwriting of the deceased. Exh. D-3, appears to be a self-addressed letter sent by the deceased to one Sood. The fact that the deceased had more than one paramour is not a material circumstance though it may indicate that the appellant could not have had any compelling motive to abet the abortion complained of. The fact that the appellant was in terms of illicit intimacy with the deceased, an unmarried girl and that later became pregnant through him is without more, not sufficient to connect the appellant with the crime.

8. From the evidence of Misrilal and Sengupta, it is clear that the appellant and the deceased had gone together to Jodhpur on April 24, 1963. But from the evidence of Sengupta, it is also clear that the deceased had some work to attend to at Jodhpur. It is also clear from the evidence of Miss Chhayadass that the deceased and the appellant were going together to Jodhpur and other places off and on. It may be noted that while returning from Jodhpur to his native place,

the appellant left the deceased with Mr. and Mrs. Sengupta. Hence the circumstance that the appellant and the deceased went together to Jodhpur on April 24, 1963, cannot be held to be an incriminating circumstance.

9. This leaves us with the evidence relating to the actual abetment. On this aspect of the case the only evidence brought to our notice is the evidence of Miss Chhayadass and the letter Ex. P. 4. Miss Chhayadass reposed in the trial Court that when the pregnancy of the deceased became noticeable, the appellant told the deceased in the presence of that witness that he would get the child aborted through Mst. Radha. As mentioned earlier Miss Chhayadass is a highly unreliable witness. She had admitted in the committal Court that she had been tutored by the police to give evidence. In fact she pointed out a police officer who was in the Court as the person who had tutored her. In the trial Court she denied that fact. There is no gainsaying the fact that she was completely under the thumb of the police. She deviated from most of the important admissions made by her during her cross-examination in the committal Court. Coming to the question of the abetment referred to earlier, this is what she stated during her cross examination in the committing Court:

"My sister did not tell Madan Raj about her illness (arising from her pregnancy) in my presence. On being enquired by me about my sister at Jalore I was informed that my sister had gone to Mst. Radha Nayan in the hospital for treatment. No talks about it were held before me prior to my talk at Jalore (talks between Madanraj and my sister about treatment)."

10. According to the admissions made by her in the committal Court she came to know for the first time about her sister's intention to cause miscarriage only after her death. No reliance can be placed on the evidence of such a witness.

11. Now coming to Exh. P. 4, this is a letter said to have been written by the deceased sometime before her death intending to send the same to the appellant (which in fact was not sent. It was found in her personal belongings after her death. There was some controversy before the Courts below whether the same is admissible under Section 32 (1) of the Evidence Act and whether it could be brought within the rule laid down by the Judicial Committee in *Pakala Narayana Swami v. Emperor*, AIR 1939 PC 47.

We have not thought it necessary to go into that question as in our opinion the contents of the said letter do not in any manner support the prosecution case that the appellant instigated the deceased to cause miscarriage. The letter in question reads thus:

"Shanti Bhawan
28-4-63.

I went with your letter to the father. Since I could not get money from him, I dropped you a letter. I went to Mst. Radha and asked her to give me medicine. I further said that the money would be received. She gave me a tablet and told me that injection would be given on receipt of full payment. This tablet is causing unbearable pain and bleeding but the main trouble will not be removed without the injection. How can I explain but the pain is intolerable. I have left Sen's residence. He and particularly neighbouring doctor would have come to know every thing by my condition, which is too serious. (Meri is halat se unaki vishesker pas me Daktarji ko sub kuch pata chal jati powon tak ulati ho jati). Firstly I intended to proceed to Jalore but on reaching the Station I could not dare to proceed. I feel that you are experiencing uneasiness and trouble for me. I am causing monetary as well as mental worries to you. I have been feeling this for a considerable longer period. Please do not be annoyed.

It has become very difficult for me to stay alone for the last several days.

Had you accepted me as your better half you would have not left me alone in my such serious condition. You cannot know what sort of trouble I am experiencing. Had you been with me I would not have felt it so much. Please do not be annoyed. Perhaps no one has given you so much trouble.

I will write all these facts to my mother. I will also write about our marriage.
28-4-63.

Today is Sunday. I cannot book a trunk call to you in the Court. Today I tried on the Phone number of Hazarimal but it was engaged, and later on it was cancelled. My Pranam.

Yours Ritu.

Today I have taken injection and have come from Shanti Bhawan".

12. No portion of that letter indicates that the appellant was in any manner responsible for the steps taken by the deceased for causing miscarriage. No other evidence has been relied upon either by

the trial Court or by the High Court in support of the finding that the appellant was guilty of the offence of abetting the deceased to cause miscarriage.

13. For the reasons mentioned above we are of the opinion that there is no legal basis for the conviction of the appellant.

14. The learned Counsel for the appellant challenged the conviction of the appellant on yet another ground. As mentioned earlier he was charged and tried for the offence of abetting Mst. Radha to cause abortion of the child in the womb of the deceased but curiously enough he was convicted for abetting the deceased to cause miscarriage. Abetment as defined in Section 107 of the Indian Penal Code, can be by instigation, conspiracy or intentional aid. If the abetment was that of Mst Radha, it could have been only by instigation or conspiracy but if it was an abetment of the deceased, it could either be by instigation or by conspiracy or by intentional aid. Throughout the trial the accused was asked to defend himself against the charge on which he was tried. At no stage he was notified that he would be tried for the offence of having abetted the deceased to cause miscarriage. It is now well settled that the absence of charge or an error or omission in it is not fatal to a trial unless prejudice is caused — see *Willie (William) Slaney v The State of Madhya Pradesh*, 1955-2 SCR 1140=(AIR 1956 SC 116). Therefore the essential question is whether there is any reasonable likelihood of the accused having been prejudiced in view of the charge framed against him. From what has been stated above one can reasonably come to the conclusion that the accused was likely to have been prejudiced by the charge on the basis of which he was tried. From the cross-examination of the prosecution witnesses, it is seen that the principal attempt made on behalf of the appellant was to show that he had nothing to do with the co-accused, Mst. Radha. He could not have been aware of the fact that he would be required to show that he did not in any manner abet the deceased to cause miscarriage. The facts of this case come within the rule laid down by this Court in *Faguna Kanta Nath v. State of Assam*, (1959) 2 Supp SCR 1=(AIR 1959 SC 673). The case of *Gallu Sah v. State of Bihar*, 1959 SCR 861=(AIR 1958 SC 813) relied on by the High Court is distinguishable. Therein Gallu Sah was a member of an unlawful assembly.

He was said to have abetted Budi to set fire to a house. One of the members of the unlawful assembly had set fire to the house in question though it was not proved that Budi had set fire to the house. Under those circumstances this Court held that the offence with which Gallu Sah was charged was made out. As observed by Calcutta High Court in *Umada Dasi v Emperor*, ILR 52 Cal 112=(AIR 1924 Cal 1031) that as a general rule, charge of abetment fails when the substantive offence is not established against the principal but there may be exceptions. Gallu's case was one such exception.

15. For the reasons mentioned above we allow the appeal and acquit the appellant. He is on bail. His bail bonds stand cancelled.

Appeal allowed.

1970 CRI. L. J. 522 (Vol. 76, C. N. 122) =
AIR 1970 SUPREME COURT 446
(V 57 C 98)

(From Delhi AIR 1969 Delhi 235)
S. M. SIKRI AND V. RAMASWAMI, JJ
Nanak Chand, Appellant v. Chandra Kishore Aggarwal and others, Respondents.

Criminal Appeal No. 6 of 1969, D/- 20-5-1969.

(A) Criminal P. C. (1898), Section 488 — Hindu Adoptions and Maintenance Act (1956), Section 4 (b) — Section 4 (b) of Maintenance Act does not repeal or affect in any manner the provisions of Sec. 488, Cr. P. C.

Section 4 (b) of the Hindu Adoptions and Maintenance Act (1956), does not repeal or affect in any manner the provisions of Section 488, Cr. P. C. There is no inconsistency between the Maintenance Act and Section 488, Cr. P. C. Both can stand together. The scope of the two laws is different. The Maintenance Act is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. Section 488, Cr. P. C. provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. AIR 1963 All 355 & (1962) 2 Cr LJ 528 (Cal) & AIR 1965 Pat 442, Approved (Para 5)

(B) Criminal P. C. (1898), Section 488 (1) — "Child", meaning of — Does not

LM/AN/D364/69/LGC/M

mean a minor son or daughter — Real limitation is contained in expression “unable to maintain itself”. AIR 1967 Mad 77, Overruled.

The word “child” in Section 488 does not mean a minor son or daughter. The real limitation is contained in the expression “unable to maintain itself.” (Para 12)

The word “child” is not defined in the Criminal Procedure Code itself. This word has different meaning in different context. Where the word “child” is used in conjunction with parentage, it is not concerned with age. In Section 488 of the Criminal Procedure Code the word is used with reference to the father. There is no qualification of age; the only qualification is that the child must be unable to maintain itself. There is no justification for saying that this section is confined to children who are under the age of majority. Case law discussed. AIR 1943 Bom 48, Foll.; AIR 1967 Mad 77, Overruled. (Para 7)

(C) Criminal P. C. (1898), Section 488 — Maintenance grant to child — Court held rightly taken into consideration the existing situation, such as that one of the child was a student of M.Com., and the other was of M.B.B.S. Course, at the time of passing order. (Para 13)

Cases Referred: Chronological Paras

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| (1967) AIR 1967 Mad 77 (V 54)=
1967 Cri LJ 205, Amirithammal v. Marimuthu | 10 |
| (1965) AIR 1965 Pat 442 (V 52)=
1965 (2) Cri LJ 530, Nalini Ranjan v. Kiran Rani | 5 |
| (1963) AIR 1963 SC 1521 (V 50)=
1964-2 SCR 73, Jagir Kaur v. Jaswant Singh | 9 |
| (1963) AIR 1963 All 355 (V 50)=
1963 (2) Cri LJ 117, Ram Singh v. State | 5 |
| (1962) 1962 (2) Cri LJ 528 (Cal),
Mahabir Agarwala v. Gita Roy | 5 |
| (1950) AIR 1950 Cal 455 (V 37)=
Smt Puranasashi Devi v. Nagendra Nath | 11 |
| (1950) AIR 1950 Nag 231 (V 37)=
ILR (1951) Nag 474, State v. Ishwar Lal | 11 |
| (1943) AIR 1943 Bom 48 (V 30)=
ILR (1943) Bom 38, Ahmed Shaikh v. Bai Fatma | 7 |
| (1910) 6 Ind Cas 960=11 Cri LJ
427 (Punj), Bhagat Singh v. Emperor | 9 |
| (1873) 5 NWP HCR 237, In the
matter of W. B. Todd | 9 |

Mr. Sardar Bahadur Saharya and Miss Yangindra Khushalani, Advocates, for Appellant; M/s. S. C. Mazumdar and Yogeshwar Dayal, Advocates, for Respondents.

The following Judgment of the Court was delivered by

SIKRI, J.:— This appeal by certificate of fitness granted by the High Court of Delhi arises out of an application under Section 488, Criminal Procedure Code, filed on September 4, 1963, in the Court of Magistrate, 1st Class, Delhi, by four children of the respondent, Nanak Chand. The first applicant, Chandra Kishore, was born on January 23, 1942, the second, Ravindra Kishore, was born on September 23, 1943, the third Shashi Prabha, was born on February 23, 1947, and the fourth, Rakesh Kumar, was born on September 21, 1948. The first two applicants were thus majors at the time of the application, the third though a minor at the time of the application was a major on the date of the order passed by the Magistrate, i.e., on March 26, 1965. The learned Magistrate allowed the application and ordered the respondent, Nanak Chand, to pay Rs. 35/- p. m. to Chandra Kishore for four months only, Rs. 35/- p. m. to Ravindra Kishore for 3 years only in case he continued his medicine studies, Rs. 45/- p. m. to Shashi Prabha as her maintenance allowance and education expenses and Rs. 45/- p. m. to Rakesh Kumar as his maintenance allowance and education expenses from March 26, 1965.

2. Both the applicants and the respondent, Nanak Chand, filed revisions against the order of the Magistrate, to the Additional Sessions Judge, who dismissed the revision petition filed by the respondent, Nanak Chand, and accepted the revision petition of the applicants. The Additional Sessions Judge submitted the case to the High Court with the recommendation to enhance the maintenance allowance of the applicants in terms of the proposals made by him. The Additional Sessions Judge observed that the maintenance under Section 488 did not include the costs of college education, and therefore he did not propose to allow Chandra Kishore and Ravindra Kishore the expenses of their college education. But taking into consideration the income of the respondent and the status of the family, the Additional Sessions Judge proposed to allow Chandra Kishore and Ravindra Kishore Rs. 100 p. m. each as maintenance allowance until they finished their courses of M. Com. and

M. B. B. S., respectively. He further proposed to allow to Rakesh Kumar and Shashi Prabha each a monthly maintenance allowance of Rs 50 until Shashi Prabha was able to earn or was married, whichever was earlier, and until Rakesh Kumar was able to maintain himself.

3. The High Court accepted the reference made by the learned Additional Sessions Judge and dismissed the criminal revision filed by the respondent. The High Court granted the certificate under Article 134 (1) (c) of the Constitution because there is conflict of opinion on the question of the interpretation to be given to the word 'child' in Section 488, Criminal Procedure Code.

4. The learned Counsel for Nanak Chand has raised three points before us. First, that Section 488, Criminal Procedure Code stands impliedly repealed by Section 4 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956)—heremafter referred to as the Maintenance Act—insofar as it is applicable to Hindus, secondly, that the word 'child' in Sec. 488 means a minor, and thirdly, that the maintenance fixed for Chandra Kishore and Ravindra Kishore was based on wrong principles and was excessive inasmuch as expenses for education have been taken into consideration.

5. Section 4 of the Maintenance Act reads:

"4. Save as otherwise expressly provided in this Act,—

(a)

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

The learned Counsel says that Sec. 488, Criminal Procedure Code, in so far as it provides for the grant of maintenance to a Hindu, is inconsistent with Chapter III of the Maintenance Act, and in particular, Section 20, which provides for maintenance to children. We are unable to see any inconsistency between the Maintenance Act and Section 488, Criminal Procedure Code. Both can stand together. The Maintenance Act is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. The law was substantially similar before and nobody ever suggested that Hindu Law, as in force immediately before the commencement of this Act, in so far as it dealt with the maintenance of children was in any way inconsistent with Section 488, Criminal Procedure

Code. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Recently the question came before the Allahabad High Court in *Ram Singh v. State*, AIR 1963 All 355, before the Calcutta High Court in *Mahabir Agastya walla v. Gita Roy*, 1962 (2) Cri LJ 514 (Cal), and before the Patna High Court in *Nalini Ranjan v. Kiran Rani*, AIR 1961 Pat 442. The three High Courts have, in our view, correctly come to the conclusion that Section 4 (b) of the Maintenance Act does not repeal or affect in any manner the provisions contained in Section 488, Criminal Procedure Code.

6. On the second point there is sharp conflict of opinion amongst the High Court and indeed amongst the Judges of the same High Court. In view of this sharp conflict of opinion we must examine the terms of Section 488 ourselves. Section 488 (1) reads as follows:

"488(1)—If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

We may also set out sub-section (8) of Section 488 because some courts have placed reliance on it:

"488(8).—Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or as the case may be the mother of the illegitimate child."

7. The word 'Child' is not defined in the Code itself. This word has different meanings in different contexts. When it is used in correlation with father or parents, according to Shorter Oxford Dictionary it means.

"As correlative to parent, 1. The offspring, male or female, of human parents."

Beaumont, C J, in *Shaikh Ahmed Shaikh Mahomed v. Bai Fatma*, ILR (1943) Bom 38 at p. 40=(AIR 1943 Bom 48 at pp. 48, 49) observed:

"The word 'child' according to its use in the English language has different meanings, according to the context. If used without reference to parentage, it is generally synonymous with the word 'infant' and means a person who has not attained the age of majority. . . . Where the word 'child' is used with reference to parentage, it means a descendant of the 1st degree, a son or a daughter and has no reference to age. In certain contexts it may include descendants of more remote degree, and be equivalent to 'issue'. But, at any rate, where the word 'child' is used in conjunction with parentage, it is not concerned with age. No one would suggest that a gift 'to all my children' or 'to all the children of A' should be confined to minor children. In Section 488 of the Criminal Procedure Code the word is used with reference to the father. There is no qualification of age; the only qualification is that the child must be unable to maintain itself. In my opinion, there is no justification for saying that this section is confined to children who are under the age of majority."

8. We agree with these observations and it seems to us that there is no reason to depart from the dictionary meaning of the word.

9. As observed by Subba Rao, J., as he then was, speaking for the Court in *Jagir Kaur v. Jaswant Singh*, (1964) 2 SCR 73 at p. 84=(AIR 1963 SC 1521 at p. 1525), "Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose." If the concept of majority is imported into the section a major child who is an imbecile or otherwise handicapped will fall outside the purview of this section. If this concept is not imported, no harm is done for the section itself provides a limitation by saying that the child must be unable to maintain itself. The older a person becomes the more difficult it would be to prove that he is unable to maintain himself. It is true that a son aged 77 may claim maintenance under the section from a father who is 97. It is very unlikely to happen but if it does happen and the father is able to maintain while the son is unable to maintain himself no harm would be done by passing an appropriate order under Section 488. We cannot view with equanimity the lot of helpless children who though major are unable to support themselves because of their imbecility or deformity or other handicaps, and it is not as if such cases have not arisen. As

long ago as 1873, Pearson, J., in the matter of *W. B. Todd*, 1873-5 NWPCIR 237 had to deal with a major son who was deaf and dumb, and he had no hesitation in granting an order of maintenance. The same conclusion was arrived at by Chevis, J., in 1910 in *Bhagat Singh v. Emperor*, (1910) 6 Ind Cas 960=(11 Cri LJ 427 (Punj)) and he allowed maintenance to a young man of about 20 who was very lame having a deformed foot. We have seen no case in which a man of 77 has claimed maintenance and we think, with respect, that unnecessary emphasis has been laid on the fact that it might be possible for a man of 77 to claim maintenance.

10. It is not necessary to review all the case law. The latest judgment which was brought to our notice is that of the Madras High Court in *Amirithammal v. Marimuthu*, AIR 1967 Mad 77 in which Natesan J., has written a very elaborate judgment. He has referred to all the Indian cases and a number of English cases and statutory provisions both in England and in India. We are unable to derive any assistance from the statutory provisions referred to by him or from the English Law on the point. He relied on the use of the word "itself" in Section 488 as showing that what was meant was a minor child. We are unable to attach so much significance to this word. It may well be that it is simpler or more correct to use the word "itself" rather than use the words "himself or herself".

11. We may mention that *Das Gupta, J.*, in *Smt. Puranasashi Devi v. Nagendra Nath*, AIR 1950 Cal 455, and *Mudholkar, J.*, in *State v. Ishwar Lal*, ILR (1951) Nag 474=(AIR 1950 Nag 231) came to the same conclusion as we have done.

12. In view of the reasons given above we must hold that the word "child" in Section 488 does not mean a minor son or daughter and the real limitation is contained in the expression "unable to maintain itself".

13. Coming to the third point raised by the learned counsel we are of the view that the learned Additional Sessions Judge and the High Court were right in taking into consideration the existing situation, the situation being that at the time the order was passed Chandra Kishore was a student of M. Com. and Ravindra Kishore was a student of M. B. B. S. course. We need not decide in this case whether expenses for education can be given under Section 488 because no such expenses have been taken into

consideration in fixing the maintenance in this case. It has not been shown to us that the amount fixed by the learned Additional Sessions Judge and confirmed by the High Court is in any way excessive or exorbitant.

14. In the result the appeal fails and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 526 (Vol. 76, C. N. 123) =

AIR 1970 SUPREME COURT 450

(V 57 C 99)

(From: Punjab)

M. HIDAYATULLAH, C. J. AND
A. N. GROVER, J.

Lachman Dass, Appellant v. State of Punjab, Respondent.

Criminal Appeal No. 118 of 1968, D/- 10-10-1969.

(A) Criminal P. C. (1898), Section 423 — Appeal to Supreme Court — Accused found guilty on facts by Courts below concurrently — No interference by Supreme Court ordinarily — High Court however, brushing aside entire defence version briefly and failing to consider whether it is believable — Held, Supreme Court could appreciate evidence on facts to decide guilt or otherwise of accused.

(Para 2)

(B) Prevention of Corruption Act (1947), Section 5 (1) (d) read with Section 5 (2) — Penal Code (1860), Section 161 — Accused charged for taking bribe — His conviction on uncorroborated statement of complainant — Circumstantial and documentary evidence, however, supporting defence version — Conviction set aside — Decision of Punjab High Court, Reversed.

Accused, an Accountant in Municipality, was charged for receiving ten rupee note as bribe from a municipal contractor. Accused, being entrusted with the work of scrutinising bills submitted by the contractor, had reduced the amounts of bills substantially. Case of the complainant i.e., Contractor, was that the accused demanded him 10 Rs. and threatened that on his failure to pay the amount, bills would be further scrutinised and reduced. The accused accepted receipt of Rs 10/- but his defence was that he had actually deducted Rs. 8-12 p. for making good the over-payment already made to the complainant and has return-

ed Rs. 1-88 p. to him. The record of the municipality as well as the evidence of three witnesses including the Executive Officer of the Municipality supported the defence case. The trial Court convicted the accused for taking bribe depending on the sole evidence of the complainant and the High Court maintained the conviction though the evidence of the Executive Officer was not disbelieved.

Held, as the conviction was based on the sole evidence of the complainant who had reason to harm the accused, having reduced the bills substantially, and as there was nothing to show why the Executive officer should give false evidence in order to exonerate the accused, conviction of the accused should be set aside. Circumstantial and documentary evidence created room for doubt that the defence version was probably true and the statement of the complainant could not be accepted without corroboration. Decision of Punjab High Court, Reversed. (Para 8)

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— The appellant Lachman Dass who was an accountant of the Municipal Committee, Budhlada has been convicted under Section 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act and Section 161 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 250/- (in default to undergo rigorous imprisonment for six months). His appeal to the High Court failed and he now appeals to this Court by special leave granted by this Court.

2. Ordinarily, this Court does not consider a case after the High Court and the Court below have concurrently found the accused guilty on facts. In this case however, the judgment of the High Court merely brushes aside the entire defence version in one sentence which defence in our opinion merited close consideration with the prosecution case, to see which was believable. The learned Judge in the High Court who heard the appeal merely endorsed the findings of the Special Judge without attempting to weigh the evidence as was necessary in the appeal. We have accordingly allowed the appellant to read to us certain portions of the material evidence and have appraised it for ourselves. It is for these reasons that we shall narrate the facts a little more fully and then discuss the evidence in detail.

The incident is said to have taken place on the 24th March, 1964, at about A. M. The complainant in the case is Kishori Lal who was a plumber working in the Budhlada Municipality. For the work which he had done, he had submitted bills which it was the duty of the appellant to check and verify and certify for payment. It appears that the appellant had strictly verified these bills and reduced them from Rs. 935/- to Rs. 683/- and odd. In fact a cheque in payment of all the dues had been prepared and handed over to the complainant as far back as 16th March, 1964. The case of the complainant was that the appellant had made demands on him for bribe and had also told him that Rs. 10/- should be paid to him after the cheque had been encashed, threatening him at the same time that if the amount was not paid, the bills would be further scrutinised and reduced. This amount, it was stated, was paid by the complainant on 24th March in furtherance of this suggestion of the appellant and that is the foundation of the charge.

4. Before this amount was paid, the complainant made his report to the Sub-Divisional Magistrate who asked a police officer to arrange for a trap. The usual procedure for such traps was followed, the currency note of Rs. 10 which was the amount in demand was initialled by the Sub-Divisional Magistrate and the number of the note was taken down before it was made over to the complainant for passing it to the appellant in furtherance of his demand for bribe. The Sub-Inspector with the complainant, accompanied by two witnesses, went to the office of the appellant. None of the witnesses entered the office of the appellant. The complainant alone entered it. After some time, the complainant came out and raised his turban which was the signal that the amount had been paid. The raid followed and the currency note was found in the left hand pocket of the bush-shirt of the appellant. He was thereupon arrested. The two witnesses who accompanied the Sub-Inspector stated that the appellant had become pale and was trembling and that he gave no explanation at that time. It is however not clear whether any opportunity was given to him to explain how this money came to be with him.

5. The appellant admitted receipt of Rs. 10 in one currency note from the complainant. His explanation was that the complainant had complained to his

superior officer about the strict scrutiny of the bills by the appellant. The bills were ordered to be scrutinised again. The last bill was found to be correct, but in the previous bill the appellant found an over-payment to the complainant of Rs. 8.12 p. Therefore the appellant was asked to recover this amount from the complainant or pay it himself. He thereupon sent a notice to the complainant to bring Rs. 8.12p. and pay it into the Municipal account. The complainant came and gave a currency note of Rs. 10. The appellant returned Rs. 1.88p. from the imprest with him and prepared a receipt for Rs. 8.12p. and gave to the complainant. This statement the appellant mentioned was borne out by numerous circumstances appearing in the evidence in the case.

6. First, there were two witnesses who claimed to be present when the money was paid. They are, Chaman Lal (D. W. 1) and Ambresh Narain (D. W. 2). Chaman Lal is the Municipal Commissioner of the Budhlada Municipality. He stated that he had gone to the office of the appellant on the morning of the 24th March to enquire from the appellant what rent was payable by his friend Hans Raj towards the 90 years lease of the site in front of his house. The appellant told him that the question could properly be answered only by Shri A. N. Dhanoka, Secretary of the Municipal Committee. He therefore brought Shri Dhanoka to the office and at that time, one person whom he identified as Kishori Lal the complainant, came to the office and gave a currency note of Rs. 10 to the appellant. The appellant then started preparing a receipt for him. This receipt according to the witness was given to Kishori Lal. This part of the statement of Chaman Lal was corroborated by the evidence of Ambresh Narain (D. W. 2). He is the Secretary of the Municipal Committee, Budhlada and he also stated that at that time, Kishori Lal came to the office and gave a currency note of Rs. 10 to the appellant saying that that was the amount which he had demanded through the peon. The appellant took the currency note and issued a receipt to Kishori Lal. Immediately afterwards, a Sub-Inspector came and arrested the appellant and conducted his search.

7. These two witnesses were disbelieved by the Special Judge who tried the case on the ground that the first witness — Chaman Lal seemed to be a chance

witness and the second witness — Ambiesh Narain Dhanuka need not have been called in, because the information could have been supplied by the appellant himself. There was no other reason assigned why these persons should have perjured themselves in support of the appellant. As we shall show presently, there is further corroboration of the testimony of these witnesses from quite an independent source and in documentary records of the Municipal Committee's office. The next defence witness is Siri Pal Jan. He is the Executive Officer of the Municipal Committee. He proved that the appellant had checked the bills of the complainant and reduced it from Rs 935 to Rs 683 and odd. He proved Exs. DE/1 and DE/2 which were the bills and his endorsements. He also proved that on 16th March, 1964 a cheque of about Rs 216 was given to the complainant in full and final settlement of his account. After this bill was given, says the witness, the two bills were again checked and the witness told the appellant that he should ascertain what was the amount due. The appellant then went to him at 3.30 P. M. the same evening and told him that he had checked the account and that the second bill was correct, but that there was some overpayment in the first bill Ex DE. The witness then asked him to make a report in writing and the report Ex. DF was made to him that Rs. 8.12 p. had been overpaid. The witness then passed an order Ex DF/1 on 17-3-1964. Ex DF has been produced before us. The endorsement of the Executive Officer on the report is.

"This is certainly very bad. It shows the lack of proper care and diligence. Either the recovery be made or deposit yourself."

As a result of this, the notice Ex DG/1 was issued by the appellant. The witness proved the signature of the appellant on Ex. DG/1. This notice demanded from the complainant the sum of Rs. 8.12p. as excess payment to him. This notice had an endorsement on it of the office peon that the copy was attempted to be served upon Kishori Lal but he was not present in his house, that the peon met him in the Bazar but he refused to accept the notice and that the notice was pasted at his house. There was a cash receipt which was purported to be prepared on 24th March, 1964 Ex. DH on which the signature of the appellant was found. This receipt was the counter-

foil in the office of the Municipality and it bore the name of the contractor Kishori Lal and the fact that excess payment was made to him vide Entry No. 48 dated 24-1-1964 and the amount shown was Rs. 8.12p. This was followed by a letter which Siri Pal Jain purports to have written to the appellant bringing to his notice that the amount of the cash was checked against the cash book and it was found by the Cashier that the receipt for Rs. 8.12p. existed but it had not been entered nor had the amount been deposited with the Cashier and what his explanation was. This explanation was given to the Executive Officer by the appellant on 25th March, 1964 in which he stated that it was true that a receipt No 31/34 had been issued in the name of Kishori Lal for Rs. 8.12p. He also stated that he had been given Rs. 10 in currency note by Kishori Lal and he paid Rs. 1.88 p. as change to him from his imprest but that the Sub-Inspector immediately came and took away Rs. 10 note from him and it could not be deposited with the Cashier. All this evidence is certified to be existing by the Executive Officer. The Executive Officer also stated that after the arrest of the appellant, he got the office locked and left the key with the peon. He had questioned the peon if he had parted with the key to anybody else and the peon satisfied him that the key had not been handed over to anybody. All this evidence fitted in with the explanation of the appellant that he had received a Rs 10 note towards payment of Rs. 8.12p. which had been demanded from the contractor, that he had paid Rs 1.88p. as change to him and that the entry could not be made because both the money and the appellant were taken away by the police. There is evidence to show that on the checking of the money on the 26th March, 1964, there was a shortage of Rs 1.88p. between the amount in the cash book and the amount found in the imprest. This shortage clearly shows that the amount of Rs. 1.88p. had been paid.

8. To this explanation of the appellant and the evidence adduced by the defence witnesses, the comment of the Special Judge was that all these witnesses were falsely supporting the appellant and trying to shield him. We have not been able to find why three persons including the Executive Officer should go out of their way to shield the appellant. Nothing has

been suggested before us which would show that the Executive Officer in particular had any reason to forge documents and to give false evidence to extricate the appellant. In fact the learned Judge in the High Court tried more the case of the Executive Officer than the case of the appellant and after reasoning it fully, generated the Executive Officer but intained the conviction of the appellant. If the Executive Officer is to be believed, it would be difficult to hold that all this story about Rs. 812p. being ought to be recovered from the complainant is entirely false. There is too much documentary evidence which has the support of the Executive Officer's own testimony to be brushed aside as the learned Judge in the High Court has done. If that story is accepted and if we compare it with the evidence of the Cashier that a sum of Rs. 188p. was found short in the cash and that a receipt for Rs. 812p. had already been prepared, we reach the conclusion that the explanation of the appellant is probably true. As against this, there is only the sworn testimony of Kishori Lal to compare, because none of the witnesses for the raid ever heard any conversation. There is no other witness to support Kishori Lal in what he says. Kishori Lal had reason to harm the appellant as he had twice reduced his bills substantially. There ought to be some other evidence before his word can be accepted with so much other evidence to contradict him. In trap cases at least some panchas overhear the conversation or see something to which they can depose. In this case as against Kishori Lal's evidence we have circumstantial and documentary evidence and the evidence of the Executive Officer, of Chaman Lal and of Ambresh Narain in whose presence the receipt was prepared and given to Kishori Lal. On the whole, therefore, we are satisfied that there is considerable room for doubt in this case and that the statement of Kishori Lal which alone is the foundation of the charge against the appellant cannot be accepted without corroboration. We are satisfied that his conviction and sentence should be set aside. We order accordingly. The appellant is acquitted. The appellant is on bail. His bail bonds are cancelled. If the fine has been paid by the appellant, it shall be refunded to him.

Appeal allowed.

1970 CRI. L. J. 529 (Vol. 76, C. N. 124)

(CALCUTTA HIGH COURT)

R. N. DUTT AND N. C. TALUKDAR, JJ.

Digendra Nath Roy, Appellant v. The State, Respondent.

Criminal Appeal No. 624 of 1964, D/-28-11-1967.

(A) Penal Code (1860), S. 84—Scope and object — Section deals with deficiency of will due to weak intellect — Onus of establishing plea under S. 84 of Penal Code is on accused under S. 105 of Evidence Act — Accused must also show that unsoundness of mind was of degree and nature required by S. 84 — Mere lack of proof by prosecution, of motive for offence cannot be substitute for positive proof required of defence.

Section 84 deals with the deficiency of will due to weak intellect. The concept incorporated in the said section is as old as the hills. Jurists have given various reasons for the exemption of lunatics or of persons of unsound mind from criminal responsibility. It has been said that a mad man is best punished by his own madness — *Furiosus Furore Suo Punitur*.

It has further been laid down by the jurists that a mad man has no will — *Furiosis Nulla Voluntas Est* He is therefore in all ages an object of commiseration, but as society has to be protected even against the attacks of a maniac, the Code of Criminal Procedure provides for his detention to prevent mischief as in Sections 464 and 475 Cr. P. C. Such detention, however, is not his sentence.

(Para 8)

The legal conception of insanity differs considerably from the medical conception. It is not every form of insanity or madness that is recognised by law as a sufficient excuse. English case law discussed

(Para 9)

According to illustration (a) of Section 105 of the Evidence Act the onus of establishing the plea under Section 84 I P C rests on the accused. The burden of proving the existence of circumstances bringing the case under Section 84 I P C is thrown on the accused and Section 105 of the Evidence Act directs that "the Court shall presume the absence of such circumstances". Before the accused can be entitled to the benefit of Section 84 I P C, he must establish that at the time of committing the act, he was *Non Compos Mentis* — not of sound mind. If he does not succeed in his preliminary issue the plea must fail. In the second place, even if, the accused was of unsound mind he must prove that the said unsoundness of mind was of a degree and nature to fulfil one of the tests as laid down in the said section, namely, that by reason of such un-

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soundness of mind he was incapable of knowing the nature of the act or that he was doing what is either wrong or contrary to law AIR 1961 SC 998 and AIR 1964 SC 1563 and AIR 1966 SC 1, Foll, AIR 1967 Ker 92, Rel on (Paras 11, 13)

Mere lack of proof by prosecution of a motive for offence cannot be substitute for positive proof required of the defence, 1960 AC 432 (442), Foll (Para 12)

(B) Penal Code (1860) Ss. 300 and 302 — Intention and knowledge — Number of injuries found on neck of victim — From that fact alone it cannot be safely concluded that accused had requisite intention or knowledge in order to bring home charge under S. 302. (Para 19)

Cases Referred: Chronological Paras
(1967) AIR 1967 Ker 92 (V 54) =

1967 Cri LJ 494, Kannakunnumal Ammed Koya v State of Kerala 12

(1966) AIR 1966 SC 1 (V 53) = 1966 Cri LJ 63, Bhikari v State of U P 11

(1964) AIR 1964 SC 1563 (V 51) = 1964 (2) Cri LJ 472, Dhyabhai Chhaganbhai Thakkar v State of Gujrat 11

(1961) AIR 1961 SC 998 (V 48) = 1961 (2) Cri LJ 43, State of M P v Ahumudullah 11

(1960) 1960 AC 432 = 1960-2 WLR 588, Attorney General for State of South Australia v John Brown 12

(1955) 1955 AC 206 = 1955-1 All ER 266 (PC), Chankau v Queen 10

(1942) 1942 AC 1, Mancini v D P P 10

(1935) 1935 AC 462 = 153 LT 232, Woolmington v Director of Public Prosecutions 10

(1843) 8 ER 718 = 10 Cl and Fin 198, Daniel M Naghten Case 10

Amal Chandra Chatterjee, for Respondent

N. C. TALUKDAR, J.: This appeal is against an order dated the 31st July 1964 passed by Shri B Basak, Addl Sessions Judge, Jalpaiguri, convicting the accused-appellant under Sections 302 and 307 of the Indian Penal Code and sentencing him under the former section to undergo imprisonment for life and under the latter one to undergo rigorous imprisonment for five years, sentences to run concurrently

2. The prosecution case unfolds a sad and sordid story of a father killing his child, an infant-in-arm and also attempting to kill his wife and another minor son. Digendra alias Dwijendra Nath Roy is the son of one Kimsundar Roy (P W 11). He was living with his wife and two children in separate mess but in the same house with his father and step-mother at Madhya Nararthali. On the 28th September 1963 in the evening the accused-appellant returned home, took his meals and went out again towards the village Harmandir for

participation in the distribution of prosad and thereafter spent the night at the house of a friend. Next morning, namely, on the 29th September 1963 he came back home and after resting for some time he went to his father's portion of the house at about 8 or 9 A.M. when his parents were frying puffed rice in the kitchen. The accused pressed for the return of his money which was given to his father loan and when P W 11 refused the accused is stated to have enquired as to how would he then feed his children. To the P W 9, Baharmani, who is the step-mother, said that if he was unable to feed his children, he should kill them and being so told, the accused drew out a beki dao from the wall and started sharpening it. At that time he asked his wife Fuleswari to take her bath and then boil the rice. Fuleswari took her daughter aged about 6 months on her lap and also her minor son by the hand and started proceeding towards the river for her bath. The accused then called her back and when she came near him, he suddenly caught her and tried to assault her. In her attempt to free herself from the clutches of the accused during this scuffle the baby daughter fell down and she was at once dealt with two murderous blows by the accused — one on the right cheek and another on the abdomen as a result whereof the baby died. In the meanwhile, P W 1, Fuleswari having extricated herself from the clutches of the accused, started running towards the east — all the while being chased by the accused and when she came near a well, her son Paresh alias Kandura, who is aged about 4 years and was standing over there, was struck on the neck by the appellant with the beki dao causing bleeding injuries. Fuleswari continued to run raising alarm when the accused succeeded in catching hold of her hair. She extricated herself but the accused caught hold of her sari, which was the only thing she had on at that time. Frightened of death she left the sari and started running stark naked. The accused finding that she was going out of his clutches, threw the beki dao towards her and the same caused bleeding injuries on Fuleswari's neck. In the meanwhile the alarm raised by P W 1 had attracted the attention of a neighbour close by, namely, Dharani Thakur (P W 3) who came out of his house and saw Fuleswari in that condition and the accused chasing her with a beki dao in his hand. Dharani cried out to Sushen (P W 4), who was at the time living in the house of Bhaben (P W 14), a next door neighbour, to come out. When Sushen opened the door Fuleswari managed to get in and the door was closed, thereby the accused could not enter therein. Dharani found the injured boy running and crying and took him to

Bhaben's house. Bhaben's wife gave a cloth to Fuleswari to cover her embarrassment. The accused in the meanwhile fled away towards the south due to the alarms raised. Being attracted by the noise, one Sashi Mohan Roy (P. W. 12) and Subal Chandra Roy (P. W. 2), who is the son-in-law of P. W. 11 and who lodged the first information arrived at the place of occurrence and Fuleswari narrated the incident to Bhaben's wife and also to the above-mentioned Sushen, Sashi Mohan, Subal and Dharani. Thereafter, they proceeded in a body to the house of the accused along with the boy whose injury was bandaged. The boy was unfortunately still bleeding and thereupon he was sent to the house of P. W. 1's uncle and thence to the hospital at Kamakshyaguri where Fuleswari as well as her son were treated by the doctor. The party upon entering the house of the accused-appellant found the baby daughter lying dead in the courtyard and further found that P. W. s 9 and 11, namely, Baharmani and Kimsundar, were absent. The chowkidar came and took charge of the dead body of the child and also the Anchal Pradhan; Subal left for the Kamakshyaguri police-station and lodged the first information there (Ext. 1). The accused was not found in the village then; but towards the evening he was apprehended near his house by Mahendra (P. W. 8) and others after being surrounded. An A. S. I. of the Kamargram police-station came to the place of occurrence on the next morning and took charge of the accused and the dead body. The accused made a statement to him and produced the beki dao. After an inquest, the dead body was sent to the Alipurduar hospital for post-mortem examination. Upon completion of the investigation, the charge-sheet was submitted against the accused under Section 302 of the Indian Penal Code on the 23rd March 1964. The committing Magistrate thereafter sent the accused up to the court of session under Section 302 of the Indian Penal Code and there an additional charge under Section 307 of the Indian Penal Code was framed and the accused stood his trial under both the charges, namely, Sections 302 and 307 of the Indian Penal Code.

3. The defence case *inter alia* is that the accused-appellant is not guilty and he did not commit the murder. The further defence as would appear from the accused's statement under S 342, Cr P. C and also the trend of the cross-examination is that the accused suffers from epileptic fits and at the material time he had no sense and therefore he was incapable of knowing the nature of his act or that he was committing something which was wrong or contrary to law.

4. Nobody has appeared on behalf of the accused-appellant.

5. Mr. Amal Chandra Chatterjee, Advocate, appearing on behalf of the State, has taken us through the entire evidence and made his submission on the basis thereof. He has contended *inter alia* that the evidence on record is clear and cogent and establishes the offence charged and the plea of unsoundness of mind that has been raised under Section 84 of the Indian Penal Code has not been proved by the nature of the evidence on record in general and that of the medical evidence in particular. In any event, he has urged that the onus that was on the accused person under Section 105 of the Indian Evidence Act, has not been discharged in order to bring the case of the accused within the ambit of Section 84 of the Indian Penal Code.

(After discussing evidence his Lordship proceeded).—

7. Against the background of the evidence as traversed above, we will now proceed to examine the charges and find whether the same has been established beyond reasonable doubt. But before we do the same we have to consider and determine the material point that has been raised on behalf of the defence as to whether in the facts and circumstances of the case, the accused who was stated to be of unsound mind was protected under the provisions of Section 84 I.P.C. It was urged specifically by the defence that the accused was not a normal man and had often epileptic fits, that at the time of the occurrence he had no capacity, because of his unsound mind, to distinguish between right or wrong, and that his mental faculties were impaired to such an extent that he was unable to understand as to what he was doing. This is a point which goes to the very roots of the entire case and if it succeeds, it will be a sufficient defence to both the charges under Sections 302 and 307 I.P.C.

8. Section 84 IPC lays down that "nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law". It deals with the deficiency of will due to weak intellect. The concept incorporated in the said section is as old as the hills. Jurists have given various reasons for the exemption of lunatics or of persons of unsound mind from criminal responsibility. It has been said that a mad man is best punished by his own madness — *Furiosus Furor Suo Puniter*. As has been observed by Blackstone "the second case of deficiency in will which excuses from the guilt of crimes arises also from a defective or vitiated understanding, namely, in an idiot or a lunatic, for the rule of the law, as to the latter, which may easily be adopted also to the former

is that *Furiosus Furore Suo Punter*". It has further been laid down by the jurist that a mad man has no will — *Furiosus Nulla Voluntas Est* He is therefore in all ages an object of commiseration, but as society has to be protected even against the attacks of a maniac, the Code of Criminal Procedure provides for his detention to prevent mischief as in Sections 464 and 475 Cr. P. C. Such detention, however, is not his sentence

9. The legal conception of insanity differs considerably from the medical conception. It is not every form of insanity or madness that is recognised by law as a sufficient excuse

10. The most elaborate and authoritative exposition of the Law of Insanity in common Law is embodied in Daniel M' Naghten's case, (1843) 8 ER 718, in the answers of the fifteen judges given in June, 1843 to the questions put to them by the Lords, in consequence of the popular alarm provided by the acquittal of Daniel M' Naghten. The answers given by the Judges in the said case have been taken, on all hands, to be an authoritative statement of the Law of England on the subject of insanity as a bar to criminal responsibility. At page 722, the learned Judges laid down *inter alia* that "every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their (Jury's) satisfaction, and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong". Section 84 IPC has incorporated this definition of unsoundness of mind. It is recognised on all hands as a good excuse. A reference in this connection may also be made to the charge to the jury delivered by Mr. Justice M' Cardie in the well-known trial of Ronald True at the Central Criminal Court, Old Bailey, in May, 1922 reported in the *Notable British Trials*, Volume on Trial of Ronald True at page 246. It has thrown some revealing light on the subject and is *inter alia* as follows "The law assumes that a man is *prima facie* sane, he must satisfy you otherwise if he desires to escape the consequences of a serious crime. The English law is complex both in civil and criminal cases with regard to insanity The foreign codes are simpler. The language there used is broader, wider discretion is given to tribunals. Here we are concerned with the Criminal Law of England by which you and I are bound. It is plain, in my opinion, that insanity from a medical point of view, is one

thing, insanity from the point of view of criminal law is a different thing. Doctors exist to cure physical and mental ills. Juries and judges exist to guard the life and property and the welfare of society. There are some things which plainly are not insanity Mere eccentricity is not of itself insanity At one time in the history of the criminal law in this country, insanity was no defence..... The law, I am glad to think, has progressed since then, for all law must progress or it must perish in the esteem of men. We have now to ascertain the law as it stands today and that law was considered eighty years ago by a great body of Judges in 1843 in a case M' Naghten, (1843) 8 ER 718 which has so often been mentioned before you in this court". As the presumption of sanity, it has been observed in Halsbury's Laws of England, 3rd (Simonds) Edition, Vol-29, at p-419 that "every man is presumed to be sane until the contrary is proved and this presumption holds as well in civil as in criminal cases". As to insanity, it has further been observed in Halsbury's Laws of England, 3rd (Simonds) Edition, Vol-10, at page 287 that "where it can be shown that a person at the time of his committing or omitting an act, the commission or omission of which would otherwise be criminal, was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act or omission or as not to know that what he was doing was wrong then such a person is not in law responsible for his act". Regarding persons of unsound mind, the same principle has been reiterated after an appraisal of the abovementioned cases, as well as some others, in Russell on Crime, 11th Edn at page 109, that "all persons who have reached the age of discretion (fourteen years) are presumed to be sane, and criminally responsible and in cases where a person subject to attacks of insanity has lucid intervals, the law presumes the offence of such persons to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. In the older cases it was stated that it lay on the accused to prove that he was insane at the time of commission of an offence so as not to be liable to punishment as a sane person. But the modern rule is not so strict since the case of 1935 AC 462, in 1935 and it is now established that the prisoner need do no more than adduce evidence which raises in the minds of the jury a reasonable doubt as to his sanity". In the well-known case of Woolmington v. Director of Public Prosecutions, 1935 AC 462, at p 481 Lord Chancellor Viscount Sankey, in concurrence with the other Law Lords, said that "Throughout the web of the

English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception". The Lord Chancellor proceeded to observe that "no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained". The above observations appear to have been somewhat modified in the case of *Mancini v. D. P. P.* reported in 1942 AC 1, wherein Lord Chancellor Viscount Simon observed inter alia that "Woolmington's case was one in which the defence to the charge of murder was that of pure accident in circumstances not alleged to amount to criminal negligence. The prisoner gave evidence to that effect and my noble and learned friend Lord Sankey lays it down that if the jury are either satisfied with his explanation or upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional the prisoner is entitled to be acquitted". In the case of *Chankau v. Queen*, 1955 AC 206, the Judicial Committee observed that "in cases where the evidence discloses a possible defence of self-defence, the onus remains throughout on the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish his defence any more than it is for him to establish provocation or any other defence apart from insanity".

11. The same is substantially the principle underlying the Law in India on the subject as embodied in Section 84 of the I.P.C. and Section 105 of the Indian Evidence Act. According to illustration (a) of Section 105 of the Indian Evidence Act the onus of establishing the plea under Section 84 I.P.C. rests on the accused. The burden of proving the existence of circumstances bringing the case under Section 84 I.P.C. is thrown on the accused and Section 105 of the Indian Evidence Act directs that "the court shall presume the absence of such circumstances". In order that Section 84 I.P.C. may come into play it is to be established that the accused is of unsound mind and his cognitive faculties are so impaired that he did not know the nature of the act done by him or that what he is doing is either wrong or contrary to law. In this connection it will be pertinent to consider the several decisions of the Supreme Court on this point. In the case of *State of Madhya Pradesh v. Ahamadullah*, reported in AIR 1961 SC 998, it has been observed that "the crucial point of time at which the unsoundness of mind as defined

in Section 84 I.P.C. has to be established is when the act was committed The burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by Section 84 I.P.C., lies on the accused who claims the benefit of this exemption". This was also a case of epileptic insanity. In the case of *Dhyabhai Chhaganbhai Thakkar v. State of Gujarat*, reported in AIR 1964 SC 1563, the Supreme Court has again observed that "it is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299, of the Penal Code. But under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the exception lies on the accused, and the court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of 'shall presume' in Section 4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist". It has again been observed by the Supreme Court in the case of *Bhikari v. State of Uttar Pradesh*, reported in AIR 1966 SC 1, that "Section 84 I.P.C. can be invoked by the accused for nullifying the evidence produced by the prosecution. This he can do by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law Every person is presumed to know the natural consequence of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts. It is for this reason that Section 105 of the Evidence Act placed upon the accused person the burden of proving the exception relied upon by him."

12. It has been contended in this connection by the defence that the prosecution could not really prove any motive as to why the said offence was committed by the accused-appellant and as such it appears *prima facie* that the accused, unless he was of an unsound mind, could not hack down his own child and attempt to kill his wife and the other son. We must hold, however, that mere lack of proof by prosecution of a motive for

offence cannot be substitute for positive proof required of the defence. In this connection we refer to the case of Attorney General for the State of South Australia v John Brown reported in 1960 A C 432, at p 442 of the said report, certain passages in the summing up of Mr. Justice Abbot, the trial Judge, have been given as follows — "Gentlemen, throughout the centuries of civilisation crimes have repeatedly been committed without any apparent or discoverable motive. That is one of the reasons why, in our childhood, we were taught never to put temptation in anybody's way and what would be temptation for another man, might be no temptation whatsoever to us. You may, perhaps, remember the words of Shakespeare — "How oft the sight of means to do ill deeds makes ill deeds done" Lord Tucker in delivering the opinion of the Privy Council refused to accept the presumption of law indicated in the High Court's judgment that uncontrollable impulse is a symptom of insanity and observed as follows "But where the whole case for the defence is based upon the accused having a particular form of mental disease such as schizophrenia, the nature and symptoms of which are known to psychiatrists but knowledge of which cannot be attributed to a jury, the law will not step in to instruct a jury in the absence of medical evidence as to the 'true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree'." We hold therefore, that the standard of proof required by the law of India under Section 84 IPC read along with the provisions of Section 105 of the Evidence Act, is not any the less, and that a mere lack of proof by the prosecution of a motive for the offence cannot be a substitute for the positive proof required of the defence. In the present case the evidence does not fulfill the onus which was on the accused to establish insanity. We further refer to the recent case of Kannakunnummal Ammed Koya v. State of Kerala, AIR 1967 Ker 92, wherein Mr Justice Anna Chandy and Mr Justice M Madhavan Nair, have held that to earn exemption under Section 84 IPC defence has to prove insanity of accused at the time of the offending act and that fear complex, excitement or irresistible impulse with loss of self-control, even if proved in a case, affords no defence to a crime under the Indian Law. They have further held that the burden of proving existence of circumstances bringing case under Section 84 IPC lies on the accused and the court must presume absence of such circumstances.

13. To put it in a short compass, the essential ingredients of Section 84 of the Indian Penal Code, are in the first place

with the accused. Before he can be entitled to the benefit of Section 84 IPC he must establish that at the time of committing the act, he was Non Compos Mentis — not of a sound mind. If he does not succeed in this preliminary issue, the plea must fail. In the second place, even if, the accused was of unsound mind he must prove that the said unsoundness of mind was of a degree and nature to fulfil one of the tests as laid down in the said section, namely, that by reason of such unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what is either wrong or contrary to law.

14. Let us now test the evidence on the point in the light of the principles mentioned by us above. (His Lordship then discussed the evidence and proceeded —)

15. In view of the said evidence, although in the first blush it may appear that a father would not kill his own daughter and injure his wife and a son until he went berserk, but nonetheless first impressions alone will not do. In order to get the benefit of Sec 84 of the Indian Penal Code the essential ingredients thereof must be satisfied and having traversed the evidence on record, we are of the opinion that it cannot be said that it is one of those cases which come clearly within the ambit of Section 84 IPC. The evidence on record, fails not only to establish the most material point that the accused was insane or was of unsound mind at the time of committing the offence but, on the other hand, the body of evidence adduced in this behalf by the prosecution rules it out. At best it establishes that the accused-appellant is a diseased person and undergoes epileptic fits. But it does not appear on the evidence on record that he had any such fit on that day immediately before or after the occurrence or during the period when he was absent from the place of occurrence and before his arrest in the evening on the date in question. It is also shrouded in darkness. Therefore although one may have some sympathies for the accused, the same cannot however be sustained upon ultimate analysis. It is said that law is good but justice is better. But it is also true that justice must be in accordance with law. Therefore although the incident may after all have been due to an outburst of the accumulated frustration of an unfortunate person, who was dogged by ill-luck at every step, we are constrained to hold that he is not entitled to the protection under Section 84 of the Indian Penal Code.

16. We will now enter into the merits of the case and take up for our consideration the charge under Section 302 IPC in the first instance. In order to establish the same, the prosecution has got to prove

in the first place that the death of the child has taken place, secondly, that such death has been caused by or in consequence of the act of the accused-appellant, and thirdly, that the said act was done with the intention of causing death or it was done with the intention of causing such bodily injury as the accused knew that it was likely to cause death or is sufficient in the ordinary course of nature to cause death or it was so imminently dangerous that it must, in all probability, cause death, or such bodily injury as was likely to cause death

17. As to the death of the infant daughter of the accused-appellant, it is challenged P.W. 21 Kanti Ranjan Das, A.S.I. of Kumargram Police Station, proceeded to the place of occurrence on the morning following the 29th September, 1963, and found the body of the dead girl and held an inquest on it in presence of Dharani Chatterjee, Mutaru Roy, Har Kanta Roy and others on the identification by P.W. 1, the mother. He sent the dead body for post-mortem examination through a constable (P.W. 22) and the post-mortem examination was held by P.W. 5. The dead body was identified by P.Ws. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 19, 20 and 22. These witnesses, therefore, clearly prove the death of the infant daughter of the accused-appellant on the 29th September, 1963. As to how she died, P.W. 5, who held the post-mortem examination on the dead body of the child, found several injuries

1. 4" x 1" x bone deep incised wound on the right cheek

2. 3" x 2" x cavity deep incised wound on the left side of the abdomen

And on dissection he found the 9th and the 10th ribs cut along injury No 2. Death, in his opinion, was due to shock as a result of the injuries which were homicidal and ante-mortem in nature. In any event, the said evidence of P.W. 5 establishes beyond reasonable doubt that the baby daughter of the accused-appellant died because of the injuries found on her person by the said witness. The doctor further stated that those injuries, as found by him, were caused by a heavy and sharp-cutting weapon like a beki dao like Ext. I. The 'Corpus Delicti' therefore is well established.

18. The next point for determination is as to who inflicted the said injuries which caused the death of the baby. P.W. 1 Fuleswari, P.W. 9 Baharmani and P.W. 11, Kimsunder are the material witnesses on the point and they have unequivocally stated that it was the accused-appellant who inflicted the said injuries in the manner mentioned above. There is no reason to disbelieve this body of evidence. Some criticism was made that P.W. 9 being the step-mother, may have

been interested, but the same does not hold good so far as the evidence of P.Ws. 1 and 11 is concerned. They have not been even cross-examined on the point and there is no reason as to why their evidence should be brushed aside. As the doctor has held that the death of the baby was due to the injuries described above, it can be safely concluded that the death of the baby was caused by the injuries inflicted on her by the accused-appellant as deposed to by P.Ws. 1, 9 and 11.

19. The question that now remains for consideration is whether the accused-appellant had any intention to cause the death of the infant daughter or had the intention of causing such bodily injury as the offender knew it to be likely to cause her death or that it was done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death or that the accused knew that it was so imminently dangerous that it must in all probability, cause death and committing such act without any excuse. We have been taken through the evidence on record and it is difficult for us to hold, on the evidence on record and in the peculiar facts and circumstances of the case, that there was any such intention or knowledge. Undoubtedly, there was a number of injuries and the seat of the injuries was on the neck, but it cannot from that alone be safely concluded, in view of the other circumstances on record, that the accused-appellant had such knowledge. The learned Additional Sessions Judge in order to hold the accused-appellant guilty under Section 302 of the Indian Penal Code has concluded that he was so guilty because the nature of the injuries was such that it can be concluded safely therefrom that the accused had either the intention to cause the death of the child or had the knowledge that death was the most likely result of such act. There is no finding at all that the person committing the act knew that it was so imminently dangerous that it must, in all probability, cause death. It was more so incumbent in view of the peculiar facts and circumstances of the case. The accused was an epileptic patient. Evidence further is that he was the head of a hungry family and was buffeted by misfortune. P.W. 1 Fuleswari herself in her evidence has unequivocally stated that the accused and the members of his family were passing their days in great difficulty due to want of money and that 2 or 3 days before the occurrence they could not even have their normal meals. She further stated that the accused could not feed them properly and he sometimes used to go off his head and during this period he himself could not eat and used to be silent. Coupled with this is the evidence of P.Ws. 9 and 11 that the step-

mother advised the son to kill his family if he could not feed them properly and immediately thereupon the son, who is the accused-appellant, brought out a beki dao and started assaulting the members of his family. It is difficult for us to hold in the circumstances that the accused had any such requisite intention or knowledge in order to bring home the charge under Section 302 of the Indian Penal Code. We find however that the evidence on record is sufficient enough to establish a charge under Section 304 Part I of the Indian Penal Code.

20. As to the next charge under Section 307 of the Indian Penal Code that on or about the same date and at the same time the accused caused hurt to his son and to his wife with such intention and knowledge and under such circumstances that if by those acts he had caused the death of those two persons, he would have been guilty of murder and thereby committed an offence under Section 307 of the Indian Penal Code, the evidence on the point can be put in a short compass. The doctor (PW 17) has deposed that on the 29th September, 1963, he examined Paresb alias Kandura aged about 3 years and he found several injuries which we have already discussed above. According to him, the said injuries were caused by a sharp-cutting weapon, as for example, a beki dao like Ext I and he further stated that the neck is a vital part of the body and had the blows been struck with greater intensity, they might have caused the death of the injured PW 17 has not been cross-examined at all. Coupled with this is the evidence of PWs 1, 2, 3, 4 and 6, establishing the elements of the charge under Section 307 of the Indian Penal Code. We have already discussed the evidence and hold that upon the same, the charge under Section 307 of the Indian Penal Code has been established beyond reasonable doubt. Beki dao is a sharp weapon and as such a dangerous one and the neck is a vital part of the body. The accused had not only struck his son Paresb but had further thrown the beki dao towards Fuleswari striking her on the neck. The defence was, as we have already observed before, the plea of unsound mind under Section 84 of the Indian Penal Code. We have already found that the exemption provided for under Section 84 of the Indian Penal Code is not available to the accused-appellant and, therefore, we hold that the charge under Section 307 of the Indian Penal Code has been well established.

21. In view of our above findings, we convert the order of conviction of the accused-appellant from Section 302 of the Indian Penal Code to one under Sec 304 Part I of the Indian Penal Code and sentence him to undergo rigorous imprisonment for 7 (seven) years. We uphold the

order of conviction and sentence of the accused-appellant under Section 307 of the Indian Penal Code and direct that the sentences are to run concurrently. The appeal is disposed of accordingly.

22. R. N. DUTT, J.: I agree

Order accordingly

1970 CRI. L. J. 536 (Vol. 76, C. N. 125)

(DELHI HIGH COURT)

(HIMACHAL BENCH)

T. V R. TATACHARI, J.

Devi Ram, Petitioner v State, Respondent

Criminal Revn Appln No. 66 of 1968
D/- 11-1-1968

(A) Criminal P.C. (1898), Ss. 244, 242, 342 — Prosecution of accused for offence under S. 409, Penal Code (1860) — Accused denying receipt of money and his signature on receipt — Request to get signature verified by handwriting expert — Duty of prosecution — Conviction without getting expert's opinion is illegal.

Depending on the oral evidence of certain witnesses, the accused was sentenced for offence under S 409, Penal Code (1860) though he denied twice in examination under Ss 242 and 342 that he had either received any amount or passed receipt therefor under his own signature. He also stated that the concerned receipt be sent to handwriting expert, but the Magistrate refused to do so on the ground that the accused had never applied.

Held, that it was the bounden duty of the prosecution to get the signature examined by a handwriting expert in order to establish their case against the accused, as it reflected to a considerable extent on the credibility of the witnesses, on whose evidence the conviction was based.

(Para 17)

(B) Criminal P. C. (1898), S. 342 — Examination under — Failure of Magistrate to make detailed reference to prosecution evidence — Prejudicial to accused — Contravenes S. 342 — Accused already knowing case against him — No ground to excuse such failure.

The object of S 342 is to give opportunity to the accused to answer each and every piece of evidence adduced and relied upon by the prosecution. Therefore, it cannot be said that the accused is not prejudiced by the absence of a detailed reference to the prosecution evidence in the examination under S 342, only because he knew the case against him. Thus, putting a question to the accused in examination under S. 342, as to whether he heard and understood the statements of the prosecution witnesses who had appeared against him and his

answer in affirmative thereto, does not satisfy the requirement of S. 312 AIR 1953 SC 468 & AIR 1955 SC 792, Foll

(Paras 21, 23)

(C) Criminal P. C. (1898), S. 439 — Retrial when granted — Conviction by trial Court based on unreliable evidence only — Accused under trial for long period — Retrial is not justifiable.

Where the only evidence on which conviction is based has to be regarded as unreliable and the same is excluded and there is no other evidence adduced by the prosecution which brings home the guilt of the accused, it is unfair to and even an harassment of the accused to remand the case for fresh trial after the lapse of nearly 4 years from the date of alleged offence and thereby enable the prosecution to fill up the lacuna in their evidence AIR 1955 SC 792, Foll

(Para 24)

Cases Referred: Chronological Paras

(1955) AIR 1955 SC 792 (V 42) —

1955 Cri LJ 1614, Manchander v.

Hyderabad State

22

(1953) AIR 1953 SC 468 (V 40) —

1953 Cri LJ 1933, Hathe Singh v.

State of M. P.

21

S Malhotra, for Petitioner, K. C Pandit, for State.

ORDER:— This Revision has been filed against the judgment of Shri Raiinder Nath Aggarwal, Sessions Judge, Mahasu dated 16-9-1967, in Criminal Appeal No. 33/M-10 of 1967, dismissing the appeal and upholding the order of conviction and sentence passed by Shri Roop Singh Negi, Magistrate, 1st Class, Jubbil, dated 28-7-1967, against Devi Ram, the petitioner herein

2. The case of the prosecution was as follows —

One Jhinu Ram had obtained a decree for Rs. 1891 50 paise against one Bir Singh a resident of the village Kadi. The decree-holder, in execution of the decree, got the property of the judgment-debtor attached. On 8-1-1964, the executing court issued a warrant of sale which was made returnable on 27-2-1964. The date of sale was fixed as 18-2-1964. The warrant of sale that was issued was for Rs. 1391.50 paise. The said warrant was sent to the Tehsildar Chopal, for execution, and the said Tehsildar entrusted the warrant for execution to Devi Ram, the petitioner herein, who was a bailiff.

3. On 18-2-1964, Devi Ram accompanied by a peon, Kundan Singh, and the decree-holder, Jhinu Ram, went to the village of the judgment-debtor, Bir Singh. Two persons, namely, Sunder Singh and Durga Singh, were summoned to the house of judgment-debtor. Devi Ram asked the judgment-debtor whether he was willing to pay the decretal amount and also told him that if he did not pay

the amount, his property would be sold. The judgment-debtor expressed his willingness to pay the decretal amount.

4. The judgment-debtor had previously paid Rs. 1,000/- to the decree-holder, and on 18-2-1964, only Rs. 891.50 paise remained to be paid to the decree-holder. The judgment-debtor paid the said sum of Rs. 891.50 paise to the bailiff, Devi Ram, towards the balance of the decretal amount. Devi Ram executed a receipt (Ex. P/S) on which the two persons mentioned above, Sunder Singh and Durga Singh, attested as witnesses. The decree-holder demanded the amount from Devi Ram, but was told by Devi Ram that the amount would be sent to the court and he could take the money from the court. But, on the way, the bailiff, Devi Ram, told the decree-holder that he would pay the money to the decree-holder, and that the latter should give a receipt for the same. The decree-holder was agreeable to it, but the bailiff, Devi Ram, offered to pay only Rs. 700/-. The decree-holder refused the same and wanted the payment of the full amount of Rs. 891 50 paise. Thereupon, Devi Ram told the decree-holder that he would have to wait for a year to get the amount. In the result, no amount was paid to the decree-holder by Devi Ram.

5. On 27-2-1964, the decree-holder Jhinu Ram, appeared before the learned Subordinate Judge, Shri P. L. Sharma, and was told by the learned Subordinate Judge that neither the report of the bailiff had come nor the money was received. The decree-holder, Jhinu Ram, told the Subordinate Judge that Rs. 891 50 paise, the balance of the decretal amount, had been paid by the judgment-debtor to the bailiff. Thereupon, the learned Subordinate Judge sent a communication to the Tehsildar, Chopal, asking the latter to send the report and the money to the Court of the Subordinate Judge, Theog. The decree-holder told the Tehsildar also that the judgment-debtor had paid the amount of Rs. 891-50 paise to the bailiff, Devi Ram. The Tehsildar summoned the bailiff, and the bailiff told the Tehsildar that out of the amount of Rs. 1390 50 paise mentioned in the warrant of sale, the decree-holder had received Rs. 500/- in lieu of the goods attached, that the judgment-debtor stated that he would pay the balance of Rs. 891 50 paise in the evening, that the judgment-debtor did not, however, pay the said amount in the evening, and that, therefore, the said amount was not received at all from the judgment-debtor.

6. The Tehsildar conducted an enquiry and sent a report (Ex. P/II) to the Subordinate Judge, Theog, for further action. The Subordinate Judge, Theog, sent the report to the District and Sessions Judge, Mahasu. On a report by the learned

Sessions Judge, Mahasu, a case under Section 409, Indian Penal Code, was registered against the bailiff, Devi Ram, the petitioner herein

7. The prosecution examined 13 witnesses in support of its case. Out of them, the material witnesses were PW 5 Bir Singh (judgment-debtor), PW 6, Jhinu Ram (decree-holder), PW 7. Sunder Singh (who attested as witness on the receipt, Ex P/S), and PW 8, Durga Singh (who also attested as witness on the receipt, Ex P/S)

8. The accused, Devi Ram, was examined on two occasions, once at the beginning of the trial, and then again on the conclusion of the prosecution evidence. In the first examination, the accused admitted that he was entrusted with the warrant of sale, but denied having received the amount of Rs 891 50 paise from the judgment-debtor and executed the receipt. He also stated that the receipt was not in his hand and that it should be sent to an expert for his opinion. In his second examination, after the conclusion of the prosecution evidence, he stated that the witnesses made false statements, that he did not execute the receipt (Ex P/S), and that he wished to send it to a handwriting expert.

9. He also examined two witnesses, DW 1, Kundan Singh, and DW 2, Roshan Lal. DW 1 stated that he knew the handwriting of the accused, and that the signature (Ex PW 7/A) on the receipt (Ex P/S), was not the signature of the accused, Devi Ram. DW 2 stated that he had prepared a copy of the receipt (Ex P/S), at the time of the enquiry by the Tehsildar, and that in that copy, the word 'Na' was left out by mistake.

10. The learned Magistrate by his judgment, dated 28-7-1967, believed the evidence of the prosecution witnesses and held that the accused, Devi Ram received the sum of Rs 891 50 paise from the judgment-debtor, and did not pay the same either to the decree-holder or into the court, that he thus misappropriated the amount and committed the offence under Section 409, Indian Penal Code. In the result, the learned Magistrate convicted the accused and sentenced him to rigorous imprisonment for one year and to pay a fine of Rs 500/- and in default of payment of the fine to further undergo rigorous imprisonment for 4 months.

11. Against that judgment, the accused preferred Criminal Appeal No 33-M/10 of 1967 to the Court of the Sessions Judge, Mahasu. The learned Sessions Judge, by his judgment, dated 16-9-1967, dismissed the appeal. It is against that judgment that the accused has preferred the present Revision Application to this Court.

12. Shri S. Malhotra, the learned

counsel for the petitioner, raised three contentions before me, viz —

(1) that the lower courts committed an irregularity in not sending the receipt (Ex P/S) for the opinion of a handwriting expert,

(2) that the evidence of the prosecution witnesses regarding the payment of the amount by the judgment-debtor to the petitioner and his execution of the receipt (Ex P/S), should not have been accepted by the lower courts, and

(3) that the prosecution case was not put to the accused in detail in his examination under Section 342 of the Criminal Procedure Code, and that the petitioner was considerably prejudiced thereby.

13. The receipt (Ex P/S), which is alleged to have been executed by the petitioner, Devi Ram, is in Urdu, and the same was translated by the learned counsel for the petitioner as follows —

"The occasion for writing that Rs 891 50 paise, half of which are Rs 445 75 p were not received in the case of Jhinu Ram, decree-holder v Bir Singh, judgment-debtor, from Shri Bir Singh, judgment-debtor. Hence this receipt dated 18-2-1964

Sd/- Devi Ram Bailiff
18-2-64

Sd/- Sunder Singh Sd/- Durga Singh
Parwey Kedi
18-2-64

14. As already stated, the petitioner, Devi Ram, was examined on 11-6-1965, by the Magistrate, before the trial commenced. In that examination, he was put a question and he answered the same as follows —

"Question Kaya Kuch Aur Bhi Kahena Chahate Ho? (Do you want to say anything else?)

Answer Meri Rasid Yahe Nahin Hai
Expert Ko Bheji Jave Yahe Mere Hath Ki Likhni Nahin

(This is not my receipt. This should be sent to the handwriting expert. This is not written in my hand.)"

15. After the conclusion of the prosecution evidence, the petitioner, Devi Ram, was examined under Section 342, Criminal Procedure Code, on 8-11-1966. In this examination he was put only 4 questions and he answered the same. The questions and answers were in Hindi and they have been translated by the learned counsel for the petitioner as follows —

"1 Question Have you heard and understood the statements of prosecution witnesses who appeared against you?

Answer Yes

2 Question Do you wish to say something about the witnesses?

Answer Yes. All the witnesses have made incorrect statements.

3 Question Will you lead defence?

Answer: Yes.

4. Question: Do you wish to say anything else?

Answer: Yes. The receipt which has been produced against me is incorrect. I wish to send it to the handwriting expert for examination."

16. The contention of the learned counsel for the petitioner is that the accused requested that the signature on the alleged receipt (Ex: P/S) should be sent to a handwriting expert for his opinion, and that the lower courts erred in not sending the same to the handwriting expert. A similar argument was pressed before the learned Magistrate. He brushed it aside by observing that the accused stated in his statement under Section 312 that—

"he wants to send the receipt (Ex: P/S) to the handwriting expert but he never applied to do the same."

In another part of the judgment, the learned Magistrate again observed as follows—

"He also denied his signature on this receipt for which in his statement given by him under Section 312, Cr. P. C., he wanted to send it to handwriting expert which he failed to do so, and he produced Kundan Singh, D.W. 1, who states that the signatures of Shri Devi Ram, accused, do not tally with the signatures of Ex: P.W. 7/A on Ex: P/S."

The learned Sessions Judge dealt with a similar argument before him by observing as follows—

"The witnesses for the prosecution have in clear words stated that the signatures at the place Ex: P-7/A are that of the accused. I have no reason to disbelieve the statements of prosecution witnesses in this respect. I find it will serve no useful purpose to send the receipt to handwriting expert for having his opinion."

17. The observation of the learned Magistrate that the accused wanted to send the signature on the receipt to the handwriting expert but failed to do so and never applied to do the same, is clearly an erroneous approach to the question. The accused, even in his examination prior to the examination of the prosecution witnesses, stated in clear terms that the receipt was not executed by him and should be sent to a handwriting expert. It is true that in his examination under Section 342, Criminal Procedure Code, after the conclusion of the evidence of the prosecution, he used the words that he wanted to send the signature on the receipt to a handwriting expert. Reading the two answers together, it is obvious that his intention was that the court should send the disputed signature on the receipt to a handwriting expert. Further, when the signature on

the receipt was denied by the accused, it was the bounden duty of the prosecution to get the signature examined by a handwriting expert in order to establish their case against the accused. The learned Sessions Judge also erred in thinking that no useful purpose would be served by sending the alleged signature on the receipt to a handwriting expert. He failed to see that if the signature was found not to be the signature of the petitioner, Devi Ram, it reflects to a considerable extent on the credibility of the witnesses, P.Ws 5 and 8, who deposed that the petitioner, Devi Ram, executed the receipt after receiving the money from the judgment-debtor. It was, therefore, essential that the signature on the receipt should have been sent to a handwriting expert.

18. Both the lower courts relied upon the evidence of P.Ws 5 to 8 regarding the signature of the petitioner, Devi Ram, on the receipt (Ex: P/S).

19. P.W. 5, Bir Singh (judgment-debtor) stated in his evidence—

"I cannot read the receipt. It was written in Urdu. It is Ex: P/S."

P.W. 6, Jhinu Ram, decree-holder, no doubt, stated in his chief-examination that the accused issued the receipt, but he also stated as follows—

"I identify the paper of Ex: P/S but I cannot identify the signature on it."

P.W. 7, Sunder Singh, who is said to have signed as a witness on the receipt, stated as follows—

"I have seen Ex: P/S. It was the same receipt which was written by Devi Ram. It bears my signature as also the signature of Durga Singh."

Ex: P-7/A is the signature of Devi Ram which was made in my presence."

P.W. 8, Durga Singh, who is said to have signed the receipt as a witness, stated as follows—

"In my presence Devi Ram signed receipt Ex: P/S."

In the earlier part of the chief-examination, he stated—

"I have seen Ex: P/S, on which my signature appears at Ex: P.W. 8/A which is correct."

Thus, the evidence of P.Ws 5 and 6 does not establish that the alleged signature on the receipt (Ex: P/S) was in fact, that of the petitioner, Devi Ram. The evidence of P.Ws 7 and 8, however, is, no doubt, to the effect that the said signature was that of the petitioner, Devi Ram. But, as already pointed out if on an examination by a handwriting expert, the signature on the receipt is found to be not that of the petitioner, the statements of P.Ws 7 and 8 would not have any weight and indeed their credibility itself becomes doubtful. The petitioner was

clearly prejudiced by the failure of the lower courts or the prosecution to send the signature on the receipt for an examination by a handwriting expert, and the learned Sessions Judge was not right in stating that no useful purpose would be served by sending the signature for the opinion of a handwriting expert. In the circumstances, it was necessary in the interests of justice to get the alleged signature of the petitioner on Ex P/S. examined by a handwriting expert. As the alleged signature on the receipt was not got examined by a handwriting expert, it is not safe to rely upon it as evidence against the petitioner (accused). In this view, it is not necessary to consider the effect of the alleged alteration in the language of the receipt by the interpolation of the word "Na".

20. As regards the second contention of Shri Malhotra, since the credibility of the prosecution witnesses, particularly PWs 7 and 8, depends on the genuineness or otherwise of the alleged signature of the petitioner on the receipt (Ex P/S), and as the said signature was not got examined by a handwriting expert, it is not safe to rely on the bare oral statements of the witnesses, PWs 5 to 8, when they are not supported by any contemporaneous documentary evidence.

21. The third contention of the learned counsel for the petitioner that the evidence of the prosecution witnesses was not put in detail to the accused in his examination under Section 342, and that he was prejudiced thereby, has, in my opinion, considerable force. The four questions that were put to the accused and the answers given by him have already been extracted above. The evidence adduced and relied upon by the prosecution was not at all brought to the notice of the accused in the said questions. The learned Sessions Judge observed that the accused knew the case against him, and that, therefore, he was not prejudiced by the absence of a detailed reference to the prosecution evidence in the examination under Section 342, Criminal Procedure Code. The learned Sessions Judge clearly fell into an error in making the said observation. The accused might know what the case against him was. But the object of Sec 342, Criminal Procedure Code, is to give an opportunity to the accused to answer each and every piece of evidence adduced and relied upon by the prosecution.

In *Hathe Singh v State of Madhya Bharat*, AIR 1953 SC 468, the Supreme Court observed as follows —

"We have a further comment to make. Both the Sessions Judge and the High Court have attached importance to the fact that both the accused absconded, but at no stage of the case have they been

asked to explain this. We have stressed before the importance of putting to the accused each material fact which is intended to be used against him and of affording him a chance of explaining it if he can. We regret to find that this rule is so often ignored."

22. Again, in *Manchander v Hyderabad State*, AIR 1955 SC 792, the Supreme Court observed as follows —

"This is another of those cases in which courts are compelled to acquit because Magistrates and Sessions Judges fail to appreciate the importance of Section 342, Criminal Procedure Code, and fail to carry out the duty that is cast upon them of questioning the accused properly, fairly bringing home to his mind in clear and simple language the exact case which has to meet and each material point which is sought to be made against him, and of affording him a chance to explain them if he can and so desires. Had the Sessions Judge done that in this case, it is possible that we would not have been obliged to acquit."

The Supreme Court further observed — "We were asked to reopen the question and, if necessary, to remand the case. But we decline to do that. Judges and Magistrates must realise the importance of the examination under Section 342, Criminal Procedure Code, and this Court has repeatedly warned them of the consequences that might ensue in certain cases. The appellant was arrested in December, 1950, and has been on his trial one way and another ever since, that is to say, for over 4½ years. We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial Judges omit to do their duty. Justice is not one-sided. It has many facets and we have to draw a nice balance between conflicting rights and duties. While it is incumbent on us to see that the guilty do not escape, it is even more necessary to see that persons accused of crime are not indefinitely harassed. They must be given a fair and impartial trial and while every reasonable latitude must be given to those concerned with the detection of crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go.

Except in clear cases of guilt, where the error is purely technical, the force of the evidence that are arrayed against the accused should no more be permitted in special appeal to repair the effects of their bungling than an accused should be permitted to repair gaps in his defence which he could and ought to have made good in the lower courts. The scales of justice must be kept on an even balance whether for the accused or against him, whether in favour of the State or not; and one broad rule must apply in all cases."

23. In the present case, the prosecution or, at any rate, the trial Court should have sent the alleged signature of the accused on the receipt (Ex P/S) for examination by and the opinion of a handwriting expert. As already pointed out, the credibility of the witnesses, PWs 5 to 8, was dependent upon the genuineness of the alleged signature of the petitioner Ex. P/S. When the prosecution failed to establish the genuineness of the signature on Ex. P/S, it is not safe, in my opinion, to rely upon the testimony of the prosecution witnesses Nos 5 to 8 to the effect that the judgment-debtor paid the amount in question to the petitioner, when it was not supported by any contemporaneous documentary evidence. Further, the omission on the part of the trial Court to put to the accused every material fact in the evidence of the prosecution witnesses, sought to be relied upon by the prosecution against the accused, and thus affording him a chance to explain the same, if he can and so desires, cannot but be said to have prejudiced the defence of the accused, because, if all the material facts deposed to by the prosecution witnesses had been put to him clearly in his examination under Section 312, Criminal Procedure Code, he might have adduced such further evidence as might have been available to him. The first question put to him in the examination under Section 342 was an omnibus question, wherein he was asked whether he heard and understood the statements of the prosecution witnesses who had appeared against him. This does not satisfy at all the requirement under Section 312, Criminal Procedure Code, as explained by the Supreme Court in the above mentioned decisions.

24. Thus, when the receipt (Ex P/S) as well as the evidence of PWs. 5 to 8 has to be regarded as unreliable and the same is excluded, there is no other evidence adduced by the prosecution which brings home the guilt to the accused. The judgments of the learned Magistrate and the learned Sessions Judge are vitiated by their omission to consider the above important aspects. To reopen the case and remand the same to the trial Court for a fresh trial after the lapse of nearly 14 years from the date of the alleged offence, and thereby enable the prosecution to fill up the lacuna in their evidence, would be unfair to and even an harassment of the accused.

25. For the above reasons, I allow this revision application, set aside the orders of conviction and sentence passed by the lower courts, and acquit the petitioner (accused).

Revision allowed

1970 CRI. L. J. 541 (Vol. 76, C. N. 126)

(GUJARAT HIGH COURT)

SHELAT, J.

Kanaiyalal Chumanlal Mody, Appellant
v. The State of Gujarat, Respondent

Criminal Appeal No. 622 of 1965, D/- 7-2-1967, against order of City Magistrate 7th Court Ahmedabad, D/- 30-7-1965

(A) Essential Commodities Act (1955), Ss. 7 (1) (a) (ii), 9 — Iron and Steel (Control) Order (1956), R. 4 — Mere possession of corrugated sheets is not offence — Prosecution must prove firstly that accused had acquired them and secondly that he acquired them from producer or stockholder or person holding stock of iron and steel — It is after proving these two requirements contemplated under R. 4 that burden would shift and accused would be required to show that the corrugated sheets were obtained under pass or permit, etc. (Para 13)

(B) Evidence Act (1872), S. 24 — Confession — Essentials of.

A statement in order to be a confession must be an admission in terms of the offence or at any rate substantially of facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. If the statement of the accused is suggesting inference that he committed a crime, it cannot by itself become a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt. AIR 1939 PC 47, Foll (Para 15)

Cases Referred: Chronological Paras

(1965) Cri App No 83 of 1963, D/- 25-1-1965 (SC), Kamaleshankar B Dave v State of Gujarat	15
(1952) AIR 1952 SC 351 (V 39) = 1953 Cri LJ 154, Palvinder Kaur v State of Punjab	15
(1950) 52 Bom LR 508 (PC), Ghulam Hussain v King	15
(1939) AIR 1939 PC 47 (V 26) = 40 Cri LJ 364, Pakala Narayana Swami v Emperor	15

H. K. Thakore, for Appellant; G. T. Nanavaty Asst. Govt Pleader, for Respondent

JUDGMENT:— This appeal arises out of an order passed on 30-7-1965 by Mr. C. H. Vasayda City Magistrate, 7th Court Ahmedabad, in Criminal Case No 1389 of 1964 whereby the appellant-accused came to be convicted and sentenced to suffer rigorous imprisonment for four months

EL/IL/C213/68/JHS/B

and to pay a fine of Rs. 2000 or, in default, to suffer further rigorous imprisonment for three months for an offence under Section 7 of the Essential Commodities Act read with Rule 4 of the Iron and Steel (Control) Order, 1956 (hereinafter referred to as the 'Act' and the 'Order' respectively)

2. On receipt of some information from the Controller of the Iron, Steel and Cement Commodities for the Ahmedabad Region, Mr Ghatalia, the Assistant Controller accompanied by Mr Rawal, the Supervisor, working in that office, and two police constables went to Khamasa Gate, in Ahmedabad at about 3 p m on 19-6-1964. They stopped their jeep car and after taking the panchas with them, they went to the shop of the accused. The accused and his father Chimanlal were present there. On questioning the accused, Mr Raval was told that it was his shop and that the corrugated sheets which were lying in the shop belonged to him. They were then taken to the godown from where 221 corrugated sheets were found. They were all new sheets and had no holes. On being asked if he had any pass or permit for possessing the same, the accused said that he had none. He had, however, shown two bills. A panchnama was then drawn up in respect of all the corrugated sheets found from that place. Thereafter Mr Ghatalia recorded the statement of the accused, and after it was read over to him, he put his signature thereon. A freezing order was then passed and given to the accused. The complaint was then lodged with the police. After making the necessary investigation, the charge-sheet against the accused was sent up to the Court of the City Magistrate, for having acquired the corrugated sheets without any pass or permit and thereby committed a breach of R 4 of the Order and that way liable under Section 7 of the Act.

3. The accused denied to have committed any offence whatever. He filed his written statement Ex 2-A wherein he written several contentions. According to him, the attachment of goods from his shop was illegal, and apart from not admitting the contents of his statement, since it was recorded by the police under threats and coercion, it was inadmissible in evidence in view of Ss 24, 25 & 29 of the Indian Evidence Act. He further stated that he was in no way connected with B Grischandhra & Co. and if at all any such company was in existence, his father who died on 27-11-1964, was managing the same. The shop premises was taken on rent by his father from the authorities of Mahipatram Rupram Ashram and he had nothing to do with the same. Lastly he has stated that the evidence given by the witnesses was false and that, therefore, he should be acquitted.

4. After considering the effect of the evidence adduced in the case, the learned Magistrate found that the accused was running the shop in the name of B Grischandhra & Co and that he was the person who had acquired and has been that way in possession of the corrugated sheets attached from his shop on 19-6-1964. He also found that his statement was admissible in evidence as it was not hit by any of the provisions of the Indian Evidence Act and that since he held pass or permit for acquiring and possessing the same, he committed breach of Rule 4 of the 'Order' and that way came to be convicted and sentenced as stated hereabove. Feeling dissatisfied with that order, the accused has come in for appeal before this Court.

5. Under Section 3 of the Essential Commodities Act, 1955, if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Then Cl (2) thereof provides that an order made thereunder shall provide for regulating by licences, permits or otherwise, the production or manufacture of any essential commodity as set out therein. It is that way that the Iron and Steel (Control) Order, 1956 came to be passed for regulating the commodities set out in the Schedule given therebelow.

6. Now the term "essential commodity" as defined in Section 2 (a) of the Act means any of the classes of commodities set out therebelow and it includes at item No (vi) "iron and steel, including manufactured products of iron and steel". If we then turn to the Schedule set out below the Order, we find a list of iron and steel materials to which Part II of the Order applies. It includes "black sheets (Plain and corrugated) and Galvanised sheets (Plain and corrugated)". Thus, the corrugated sheets which are said to have been found from the shop and godown of the accused are covered within the Schedule set out below the Order.

7. Rule 4 of the Order relates to acquisition of any iron or steel. It provides as under —

"No person shall acquire or agree to acquire any iron or steel from a producer, a stockholder or a person holding stocks of iron and steel except under the authority of and in accordance with the conditions contained in a quota certificate or permit issued by the Controller or under the authority of and in accordance with the conditions contained or incorporated in a general or special written order of the Controller."

The term "producer" and "stockholder" referred to in Rule 1 are defined in Section 2 of the Order. The term "producer" is defined in Section 2 (g) as meaning a person carrying on the business of manufacturing iron and steel. The term "stockholder" is defined in Section 2 (i) as meaning a person holding stocks of iron and steel for sale who is registered as a stockholder by the Controller, under such terms and conditions as he may prescribe from time to time. The words "or a person holding stocks of iron and steel" in R. 4 were originally not there and they came to be added by an order published in the Gazette of India dated 9th May 1959. Any contravention of this Rule 4 of the Order committed by any person is made punishable under S. 7 (1) (a) (ii) of the Act.

8. Now, the contention raised by Mr. Thakore, the learned advocate for the appellant, was that what is prohibited under R. 4 of the Order is the acquisition or agreeing to acquire any such iron or steel products from "a producer, a stockholder or a person holding stocks of iron and steel," and not mere possession thereof. That has been so obvious, as it may well be that a person may possess such sheets since before the Order came to be passed in 1956, or that he may have got them from any person who is neither a stockholder nor a producer, as defined in the Order, before 1959, or even from stray persons at different intervals who cannot be called persons holding stocks of iron and steel even though that may be after 1959, when those words came to be introduced in Rule 4 of the Order. In other words, his contention was that the prosecution must establish in the first place that the accused had possessed the corrugated sheets in question after they were acquired from any of those persons referred to in Rule 4, namely, "a producer, a stockholder or a person holding stocks of iron and steel". It is only thereafter that he can be required to show that he had acquired the same under the authority of or in accordance with the conditions contained in a quota certificate or permit issued by the Controller etc. He then urged that the prosecution has led no independent evidence whatever in that direction and the only evidence, if at all, which can be considered as admissible in law, is one contained in the retracted statement Ex. 6 of the accused which came to be recorded by Mr. Ghatalia on 19-6-1964 at the time when his shop and the godown were searched and the corrugated sheets were seized.

9. This statement Ex. 6 was sought to be attacked at first in the trial Court on the basis that it was recorded in the presence of the police constables and that, therefore, it was hit by reason of the provisions contained in Section 25 of the Evidence Act. That point has no substance

for the simple reason that the two police officers who were there were not for the purpose of investigation but for meeting any eventuality that may arise as a consequence of the search to be carried out by the officers of the Controller's office. Nor can it be said that it was a confessional statement made to those police officers as required under Section 25 of the Indian Evidence Act. That point has rightly been given a go-by before this Court. This statement was, however, sought to be attacked on the ground at first that it was recorded by the Assistant Controller by reason of his exercising powers as that of a police officer in entering and searching the premises and seizing the property and that, therefore, it was hit by Section 25 of the Act. In the alternative, it was said that it should be taken to have been obtained by inducement or threat and that way it was not admissible in evidence by reason of Section 24 of the Indian Evidence Act. The argument of Mr. Thakore in that respect was that by reason of the provisions contained in Section 9 of the Act the accused would naturally be under the apprehension that if he gave any information which was false in material particulars, he would be liable to punishment with imprisonment for a term which may extend to three years or fine or both and that, therefore, the statement which came to be recorded can be said to have been hit by Section 24 of the Act in the sense that he would be able to avoid any evil of a temporal nature in reference to the proceedings against him. We shall consider those points hereafter and for the present, as even urged by Mr. Thakore, whether on the assumption that this statement is admissible in evidence in law and that it can be used against him, any offence as contemplated under Rule 4 has been established beyond any reasonable doubt against the accused-appellant in this case. That would no doubt also be on the assumption that he was the owner and in charge of the corrugated sheets found from his shop and godown on 19-6-1964.

10. Before we consider the effect arising from that statement, it is essential to see as to what it contains and whether on that basis alone, it can be said to be enough to hold him liable for the offence in question. This statement Ex. 6 was recorded by Mr. Ghatalia, the Assistant Controller on 19-6-1964. The first part thereof relates to the premises and the person in charge of those premises. As stated therein, the business in those premises is run in the name of B. Ginschandra & Co. of which he is the sole proprietor. Those premises belonged to Malupatram Rupram Ashram, and he has described himself as a tenant thereof. Besides, the goods viz. the corrugated sheets etc. found therefrom are then said to be his and that in that shop

before Mr. Ghatalia in which he stated about his having purchased the same under one bill No US/43 dated 4-5-1964. Now if that part of the statement is read as a whole, it starts by saying that he does not possess all bills regarding the purchase of those goods but that he has only one bill which is said to be Ex 11. In other words, out of the corrugated sheets seized from his shop and godown whatever sheets can be spelled out to have been obtained under this bill Ex. 11, Mr. Nanavaty's contention is that he must have purchased them from a stock-holder i.e. a person holding stocks of iron and steel and that, therefore, in absence of his holding any pass or permit, he can be held liable for the offence in question. Now if we turn to that bill Ex 11, it is issued by one Vora Steel Traders, Iron and Steel Merchants from Bombay. The bill is addressed to Messrs B. G. Grishchandra and Co. The quantity is described as 6 and the description of the case has been given as sheets 26 M/T 33850. The amount is shown as Rs 4812-50. Then it refers to it as second sale and delivered at Bombay. Now with regard to this bill, there is no evidence sought to be led by the prosecution either for proving that it was from Vora Steel Traders of Bombay who were either stockholders or persons holding stocks of iron and steel, or with regard to the contents thereof so as to connect this bill with the corrugated sheets which came to be seized and attached from the shop and godown of the accused. Now before it can be admitted in evidence if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting under Section 67 of the Indian Evidence Act. Thus, the proof about the bill having been written and signed by Vora Steel Traders has not been there. The investigating officer could well have taken note of this bill and examined any person from Vora Steel Traders if the prosecution wanted to have it admitted in evidence. The attempt on the part of Mr. Nanavaty was to show that the bill was admitted by the accused in his statement Ex 6 and it can therefore be admitted in evidence even without any proof in respect thereof. The accused has nowhere stated that he knows the handwriting or signatures of the proprietors of the Vora Steel Traders and that the bill bears the signature of any of such persons. Besides, he has resiled from his statement, and in his statement before Court, he has not admitted any part of it. Anything said in his retracted statement and not admitted before the Court, cannot be enough to take the bill proved in accordance with law. Not only that the bill was required to be proved but that

it was further required to be shown that Vora Steel Traders were either stockholders or persons holding stocks of iron and steel, and further that the corrugated sheets seized from his shop were the same covered by that bill. There is no evidence led for any such purpose. This bill Ex. 11 has, thus, been wrongly admitted in evidence, and it has, therefore, to be eliminated from consideration of evidence in the case. The other bill Ex. 10 is similarly inadmissible in evidence, and shall also be eliminated from consideration. With all that, both the bills do not tend to confirm in any manner that the muddamal sheets seized and attached were the very sheets referred to therein. The learned Magistrate was wrong in admitting the bills in evidence, and putting any reliance thereon in the circumstances of the case.

12. Then with regard to the other sheets, there are no bills whatever and as stated by him, they were purchased piecemeal from the persons who had come to sell them. As to from whom they were purchased is not known. It was the duty of the prosecution to find out as to the person from whom they were purchased, for, after all, the prosecution was required to show that they were purchased from a stockholder or a person holding stocks of iron and steel under Rule 4 of the Order. The statement of the accused was obtained for the purpose of having proper investigation carried out on the basis of the information supplied by him. In the present case, however, no attempt has at all been made to make any inquiries as to how and from where the accused had purchased those commodities and they have been content with some of the admissions made by the accused in his statement Ex 6 in the case. Thus, the prosecution has failed to establish that these corrugated sheets which came to be seized from the shop and godown of the accused were acquired by him from any of those persons such as a producer, stockholder or a person holding stock of iron and steel. In fact even the charge framed against the accused does not refer to that part of the Rule viz about his having acquired the same from any such persons referred to therein.

13. It was, however, urged by Mr. Nanavaty that having regard to Sec 14 of the Act the burden of proof was on the accused himself no sooner he was shown to be in possession of the prohibited commodities such as corrugated sheets in question. Section 14 of the Act runs thus—

"14. Where a person is prosecuted for contravening any order made under Section 3 which prohibits him from doing any act or being in possession of a thing without lawful authority or without a permit, licence or other document, the burden of proving that he has such autho-

rity, permit, licence or other document shall be on him."

Now it is in the first place obvious that second part of the section has no application here for the simple reason that mere possession of even such prohibited commodities is not an offence. What is prohibited is an acquisition of such commodities and that again, as I said above, from particular type of persons referred to in Rule 4 of the Order. In other words, the act prohibited is not merely acquisition, nor merely possession of such commodities, but the acquisition of those commodities provided they are acquired from "a producer, a stockholder or a person holding stocks of iron and steel". Therefore, it would be incumbent on the prosecution to establish in the first instance that the accused has acquired the prohibited commodities and secondly that he acquired them from a producer or stockholder or a person holding stock of iron and steel. It is after proving these two requirements contemplated under Rule 4 that the burden of proof would no doubt shift and the accused would then be required to show that they were obtained under a pass or permit or in accordance with some conditions contained in a quota certificate or so. It is, therefore, clear that on a mere fact of finding certain corrugated sheets even in large number and even though they are new, the liability for the prosecution to prove the first two essential ingredients cannot go away. On the other hand, as already pointed out hereabove, the bill referred to in the statement which is said to relate to some of the sheets is in no way helpful—it being not admissible in evidence—and with regard to the other sheets, they are said to have been purchased piecemeal by him from persons who had come to sell them, and when that is, so, such persons coming to sale in a piecemeal manner cannot be said to be persons holding stocks of iron and steel as contemplated under Rule 4 of the Order. A person holding stocks of iron and steel may not be a registered stockholder, but nevertheless, he must be a person who holds stocks of such iron and steel. He must obviously be trading in respect of such commodities and not any person who does not deal in the same. Beyond the retracted statement Ex 6 of the accused, there is no other evidence which connects him with the crime in question. In this view of the matter, it cannot be said that he has committed breach of Rule 4 of the Order so as to make him liable under Section 7 of the Act.

14. It may be stated that the statement was recorded by Mr Ghatalia by virtue of the power conferred on him under Section 9 of the Act. The accused was bound in law to furnish any information required of him and in case he gave false infor-

mation in material particulars knowing or having reason to believe it to be false, he would become liable for an offence in that respect. The statement, however, was read out to him. He had signed it. There is nothing whatever to suggest much less show that it was obtained by threat, inducement or show of force, or promise that in case he gives out true facts or correct information, he would get some advantage or the like. When such a statement is recorded by an officer appointed under the provisions of the Act, it is not true to say that he was a police officer merely by reason of his having been given certain powers to enter, search and secure prohibited commodities from the premises, and gather information in respect thereof. He was in no way an investigating officer as such. In ordinary parlance also he is never understood as one of the type of a police officer as is often said in respect of excise officers or the like.

15. Reading the entire statement, it is difficult to say that it is a confessional statement so as to attract any of the provisions of the Indian Evidence Act. The statement in order to be a confession must be, as observed by the Privy Council in *Pakala Narayana Swami v. Emperor*, AIR 1939 PC 47, an admission in terms of the offence or at any rate substantially of facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. If the statement of the accused is suggesting inference that he committed a crime, it cannot by itself become a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt. In the present case, he does not in terms admit that he has purchased all these corrugated sheets in question either from any stockholder or from a producer or from a person holding stock of iron and steel. That part of the ingredient is not admitted by him in the statement. On the contrary he has chosen to state that he has purchased in a piecemeal manner from persons who had come to sell them and thereby trying to exculpate himself from the offence in question. But a statement which may be inadmissible as confession, may well be admissible as admission as laid down by the Privy Council in the case of *Ghulam Hussain v. King*, (1950) 52 Bom LR 508 (PC). For taking them to be the admissions of the accused in respect of certain facts we may have to examine that those admissions were not obtained by threat, inducement or

promise given by the person in authority in the circumstances of the case. While Mr. Ghatala can be said to be a person in authority, as already stated hereabove, there is no evidence whatever to suggest much less show that any threat, inducement etc was at all given to obtain any such statement from the accused. Thus, it is a statement which contains admissions with regard to several facts though not a confession, and therefore, one has to take it as a whole. In the case of *Palvinder Kaur v. State of Punjab*, AIR 1952 SC 354, it has been held that the Court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible. It must be either accepted as a whole or rejected as a whole. In this view of the matter, therefore, the position comes to this. As I said hereinabove, the bills Exs 10 and 11 have to be eliminated from consideration and then we have to look to the effect that would emerge out of the statement Ex 6 read as a whole. While we take this statement to be a statement which contains certain admissions of facts which help in determining the offence in question, before we can act upon it we require some support from other evidence in the case. In Criminal Appeal No 83 of 1963 decided on 25th January 1965 by the Supreme Court of India, it has been observed that if the admission is supported by reliable evidence, it may undoubtedly lead to convict the accused. But as observed further in that very case, there was no reliable evidence and consequently the mere statement was not considered to be so enough as to base the conviction of the accused. In other words, there is no evidence of any kind whatever in the present case which can serve as a corroborative piece of evidence or as support to the admission said to have been made by the accused in his statement Ex 6 for the purpose of holding both the ingredients established viz about his having acquired the corrugated sheets and that again having acquired the same from a producer or a stockholder or a person holding stocks of iron and steel as required under Rule 4 of the Order. The admission in the statement Ex 6, therefore, merely shows that he was in possession of the premises, that he was the owner of the corrugated sheets attached from that place and that he had purchased them from some persons. There is no material to show that any of the goods attached were purchased from a producer or a stockholder or a person holding stocks of iron and steel as required under Rule 4 of the Order. In those circumstances, the offence cannot be said to have been established against the accused-appellant.

16. In the view that I have taken, it is not necessary to consider as to whether his father was in possession and in charge

of the shop, or as to whether the statement was hit by reason of the provisions contained in Sections 24 and 25 of the Indian Evidence Act I, therefore, disagree with the finding recorded by the learned Magistrate and hold that the offence against the accused-appellant is not proved beyond any reasonable doubt.

17. The appeal is allowed. The order of conviction and sentence passed against the accused-appellant is set aside. He is acquitted. Fine, if paid, is directed to be refunded to him.

Appeal allowed.

1970 CRI. L. J. 547 (Vol. 76, C. N. 127)

(MADRAS HIGH COURT)

KRISHNASWAMY REDDY, J.

In re, Kavundiappa Goundar, Appellant

Criminal Appeal No. 1034 of 1966, D/- 1-11-1968, against Judgment of Addl S J. Coimbatore. D/- 6-12-1966

Penal Code (1860), Ss. 100, 302, 304 Part II and 300, Exception 2 — Deceased drunk and in very aggressive mood indiscriminately throwing stones at house of accused and at accused — Accused receiving injuries and falling down — Deceased taking out knife to stab accused — Accused snatching knife from hand of deceased and inflicting fatal injury with it on deceased — Trial Judge convicting accused under S. 304, Part II giving him benefit of S. 300, Exception 2 — Held, accused had complete right of private defence and was entitled to inflict injury on deceased to avoid further attack — Conviction set aside. (Paras 8, 9, 10 and 11)

K. Ramaswami and R. Gandhi, for Appellant; Asstt. Public Prosecutor for State.

JUDGMENT:— The appellant, Kavundiappa Goundar who was charged under Section 302, I P C, was convicted under Section 304 (Part II) I P C., and sentenced to undergo R I. for two years by the Additional Sessions Judge, Coimbatore in Sessions Case No. 173 of 1966.

2. The charge against him is that he committed the murder of one Nachimuthu Gounder by stabbing him with a knife at about 4-30 P. M., on 31-7-1966 at Vellalapalayam.

3. The prosecution case is briefly this: Deceased Nachimuthu Gounder was residing at Lakkapurampudur and one of his sisters Pavavee was married to the appellant. Another sister, Kannammal (P. W. 4) was married to one Athappan the son of the junior paternal uncle of the appellant. Athappan died about 1 or 1½ months before the occurrence. The father-in-law and brother-in-law of P. W. 4 refused to give P. W. 4 the share of her husband's

properties to which she was entitled. The appellant and Nachimuthu interceded on behalf of P. W. 4 and got her from her father-in-law 1½ acres of land. P. W. 4 sold gold jewels of about 22 sovereigns in weight and also seven heads of cattle through the appellant and the deceased. From out of the sale proceeds, some debts due by P. W. 4's husband were discharged and in respect of the balance of amount, the deceased wanted that P. W. 4 should lend it to persons named by him. He also wanted that P. W. 4 should lease out her lands to him for a period of seven years. P. W. 4 refused to oblige the deceased saying that she intended doing personal cultivation of her lands. In respect of the cash that she had, she lent it on pronotes to persons named by the appellant. On this account there were misunderstandings between the deceased and the appellant.

3. On the day of occurrence namely 31-7-1966, at about 3 P. M., P. W. 4 and one Kasthuri, daughter of the appellant were talking with P. W. 5 Pavavee in her house. At that time, the daughter of the deceased one Perammal came running to the house of P. W. 5 and informed P. W. 4 that the deceased was coming to Vellalapalayam in order to finish P. W. 4, the appellant and his wife. Within a few minutes thereafter, the deceased came to the house of the appellant abusing him and then began to pelt stones at the house of the appellant. The appellant came out of his house and asked the deceased not to pelt stones. P. W. 7 Karuppanna Goundar, a jutka-driver of Lakkapurampudur, who happened to come to Vellalapalayam at that time for taking a passenger to Erode Hospital, saw the appellant and the deceased catching hold of each other and quarrelling on the road. P. W. 7 got down from his jutka, separated both of them and led away the deceased asking him as to why he should quarrel with his own brother-in-law.

4. About half an hour or forty-five minutes later, the deceased once again returned to the house of the appellant and began to pelt stones and shout angrily at the appellant. On seeing this, P. W. 4 and the daughter of the appellant took fright, got into the house of the appellant and bolted the door from inside. P. W. 1 Ammasai Gounder, junior paternal uncle of the deceased who was grazing goats at a field about 75 yards from the house of the appellant and P. W. 2 Komaraswami, the son of the deceased who was baling water in his land about 200 yards away from the house of the appellant, heard a noise from the house of the appellant and they rushed to the house of the appellant to see what the matter was. When they came near the house of the appellant, they saw the appellant and the deceased catching hold of each other and trying to push each other.

At that time, Pavayee, the wife of the appellant pulled the legs of the deceased and tripped him. On the deceased falling down, the appellant took out a pen-knife (M O 1) from his waist and gave a stab to the deceased on the right side of his chest. On receipt of the stab he died almost instantaneously. The appellant took his cycle (M O 2) from his house and left his house saying that he was going to the police station. While going to the Police Station, the appellant told P W 6 Ramanadham whom he met on the way that he stabbed his brother-in-law and that he was going to the Police Station. The appellant informed P W 8 also about his going to the Police Station. The appellant told P. W. 8 that when the deceased came to beat him, he had finished him. The appellant went to the house of P W 3 Sadayappa Gounder who was residing at Erode and told him that the deceased came to his house fully drunk and created panic and came again after he was specified by the mediators and started quarrelling with him and that the (the appellant) stabbed him.

5. P W 3 and the appellant went to the Police Station at about 6 P M., on 31-7-1966 and P W 3 gave a report (Ex P-1) to P W 13, the Inspector of Police. P W 13 arrested the appellant and seized M. O 1 the knife and M O 3 dhoti. P W 13 proceeded to the Village and held inquest over the dead body of the deceased and examined P Ws 1, 2, 4, 6, 8 and others. P W. 9, Dr. Natarajan of the Government Hospital, Erode, conducted the post-mortem examination on the dead body of the deceased at 11-45 A M., on 1-8-1966 and found two injuries, namely (1) an oblique, incised wound, 1" x 1 1/2" bone deep, on the right shoulder blade, just below the spine and 2" from its medial border, and (2) a penetrating wound, 4" x 1 1/2" starting just below the middle of right collar bone, extending upto the middle of sternum at the level of the 2nd intercostal space, cutting the right side of the sternum, the right 1st and 2nd ribs and directed posteriorly increasing in depth 1" in the lateral end and 4" at the medial end. On dissection, underneath external injury No 2, P W. 9 found the right superior venacava to be cut completely. He was of the opinion that the deceased would have died of shock and haemorrhage as a result of injury No 2 and that the injury was necessarily fatal. The appellant also had three injuries on his person, (1) and abrasion 2" x 2" on the back of left elbow, (2) an abrasion, 2" x 1" on the back of right elbow, and (3) a slight contusion on the left of the upper lip.

6. The appellant, when questioned under Section 342, Criminal P C both in the committal Court and in the Sessions Court stated that the deceased came twice to the house of the appellant and pelted

stones at his house, hit him with stones and when the appellant fell down on the ground, the deceased took out a knife from his waist to stab him and as he apprehended danger to his life, he snatched the knife from the hands of the deceased and when the deceased took a big stone to beat him on his head, he (the appellant) stabbed him once. Thus the appellant has set up a right of private defence of person.

7. There cannot be any doubt in this case that the deceased died as a result of the injury inflicted by the appellant with a knife. The appellant admitted that he stabbed the deceased. The main point to be considered is whether the circumstances under which the appellant stabbed the deceased were such that the appellant could not have avoided danger to his life without stabbing the deceased. The learned Sessions Judge has come to the conclusion on the evidence that the appellant had right of private defence, but had exceeded his right in causing the death of the deceased by stabbing him, and, therefore, he convicted the appellant under Section 304 (Part II) I P C, giving the benefit of Exception (2) to Sec 300 I P C. The learned Sessions Judge has rejected the direct evidence of P. Ws 1 and 2 as they were interested. P. W. 1 is the junior paternal uncle of the deceased and P W. 2 is the son of the deceased. Their evidence is undoubtedly interested and they have not come forward with the entire facts in respect of the offence. We have the evidence of P Ws 6 and 8 to whom the appellant was alleged to have told about his having stabbed the deceased and we have also the first information given by P W 3 and the statements made by the appellant under Section 342, Criminal P C.

As the direct evidence has been rejected, we have to necessarily depend upon the statements of the appellant for considering whether he would be entitled to the right of private defence. The learned Sessions Judge has been very much influenced by the fact that the appellant did not tell P. Ws 6 and 8 whom he met on the way the entire circumstances under which he stabbed, as stated by the appellant in his statements under Sec 342 Criminal P. C, and, therefore, he felt that the appellant would not be entitled to the right of private defence. One cannot expect the Appellant to have stated, in the circumstances, the entire facts to the persons whom he met casually on the way when he was in an agitated mind, determined to go to the Police Station and inform the police. The first information in this case was given by P. W 3. In the first information Ex. P. 1, it is stated as follows by P. W. 3.

"He (the appellant) said 'Brother-in-law Nachimuthu trespassed into (my) house and came to quarrel. He took

stone and pelted. The stone hit fell on (me). Pushing (him) down and taking the knife that was in his waist, I stabbed twice on the chest and back. Life became extinct due to chest-stab".

8. We cannot give much weight to this statement as it was made by P.W. 3 and this was what he heard from the appellant. So, finally we are left with the statements made by the appellant under Sec. 342, Cr. P. C. I am of the view that the statements made by him, if accepted, would entitle him to claim a complete right of private defence. I am inclined to accept the statements as there were several circumstances from which it could be inferred that at the time when the appellant stabbed, he apprehended danger to his life from the deceased.

9. The circumstances are these:— The deceased was drunk. He came to the house of the appellant and picked up quarrel. He pelted stones at the house of the appellant. P.W. 7 and others pacified him and sent him away. Within a few minutes, the deceased came again to the house of the appellant and began to pelt stones. The deceased was having a knife in his waist. The appellant sustained three injuries on his person as a result of the deceased beating him.

10. From the above facts, it is clear that the deceased was in an aggressive mood and using stones indiscriminately after having got drunk, on the appellant and at the house of the appellant. If the knife was in the waist of the deceased and, as stated by the appellant, if he took out the knife to stab him, the appellant would be justified in snatching the knife and in that state of mind to inflict injury on the deceased to avoid further attack by the deceased. It must have been very difficult for the appellant in that state of circumstances to escape by running away with the knife as it would be possible that the deceased might over-power and attack the appellant again. Taking an all round view of the entire circumstances of the case, I am of opinion that the appellant was entitled to right of private defence and he is, therefore acquitted.

11. The conviction and sentence are set aside and the appeal is allowed. The bail bonds of appellant shall stand cancelled.

Appeal allowed.

1970 CRI. L. J. 549 (Vol. 76, C. N. 128)

(MANIPUR J. C.'S COURT)

R. S. BINDRA, J. C.

The State, Petitioner v. Tomeiren Maringni, Respondent

Criminal Ref. No 6 of 1969 and Criminal Appeal No 3 of 1969, D/- 1-11-1969, Ref made by S. J., Manipur, D/- 21-1-1969.

LM/BN/F861/69/HGP/P

(A) Evidence Act (1872), S. 24 — Criminal P. C. (1898), S. 287 — Confessional statement — Correctness of, affirmed before committing Magistrate— Subsequent retraction in Sessions trial held will not carry any weight. AIR 1955 Pat 428, Rel. on. (Para 9)

(B) Evidence Act (1872), S. 24— Extra-judicial confession — Accused narrating incident to her husband — Such confession held was corroborative piece of evidence in the case. (Para 10)

(C) Criminal P. C. (1898), S. 367 — Benefit of doubt in matter of sentence.

An accused person is entitled to the benefit of doubt in the matter of sentence as in the matter of conviction. AIR 1924 Rang 179, Rel on (Para 11)

(D) Criminal P. C. (1898), Ss. 32 and 491 — Murder case — Exact circumstances which led to murder not clear—Lesser sentence of life imprisonment can be given — (Penal Code (1860), S. 302.)

It is impossible to lay down any general rule defining the classes of cases in which the lesser sentence may be imposed. Where the exact circumstances under which the life of the victim was taken are not clear then the lesser sentence of life imprisonment should be imposed. AIR 1924 Rang 179 & AIR 1936 Rang 71 & AIR 1953 Trav Co 561, Rel on (Para 11)

Cases Referred: Chronological Paras

(1955) AIR 1955 Pat 428 (V 42)=	
1955 Cri LJ 1380, Andu Mushar v. State	9
(1953) AIR 1953 SC 468 (V 40)=	
1953 Cri LJ 1933, Hate Singh v. State of Madhya Bharat	9
(1953) AIR 1953 Trav Co 561 (V 42)=	
1953 Cri LJ 1803, Ouseph v. State	11
(1948) AIR 1948 Lah 58 (V 35)=	
49 Cri LJ 26, Gurdev Singh v. Emperor	11
(1936) AIR 1936 Rang 71 (V 23)=	
37 Cri LJ 463, Nga Kan v. Emperor	11
(1924) AIR 1924 Rang 179 (V 11)=	
25 Cri LJ 1121, Mi She Yi v. Emperor	11

N Benoy Singh, for the Accused, Munindrakumar Singh, Asst. Public Prosecutor, for the State

JUDGMENT:— By judgment dated 21st of January 1969 the Sessions Judge, Manipur, convicted Tomeiren Maringni wife of Modun Maring (P. W. 1) under Section 302 I P. C for the murder of her mother-in-law Tongdar Maringni on the morning of 24-11-1967 in the village Koiyam Khunou, and sentenced her to death. He has made a reference to this Court under Section 374 Cr. P. C for confirmation of death sentence. The convict has also come up in appeal challenging the correctness of

her conviction and sentence This judgment will dispose of both the matters

2. The case of prosecution rests on confessions, judicial as well extra-judicial, made by the accused and on circumstantial evidence There was no eye-witness of the occurrence.

3. It was at about 6-00 a.m. on 24-11-1967, according to the prosecution story, that Tongdar left her house with a basket for Koiyam Konjun hill in the village for collecting vegetables, and a short while thereafter the accused Tomeiren also went from the house in the same direction About an hour after his mother had gone to the hill, Modun Maring (P W 1) went towards his paddy field in the valley While he was proceeding to the field, he saw his wife Tomeiren coming from the direction of the aforesaid hill carrying a sickle stained with blood Tomeiren told Modun that she had killed his mother. Modun instantly snatched the sickle from Tomeiren's hand and simultaneously wailed over the loss of his mother His distressing cry attracted a number of his relations and co-villagers to the spot Modun and those people then left for Koiyam Konjun hill and found Tongdar lying dead in a pool of blood with a stab injury in the region of her belly The dead body was carried to the house of Modun Thereafter, Modun and the village Chief, Moin Maring (P W 4), made for the Police station Thoubal where the former lodged the FIR
Ext P/1

4. Shri B Sen Sarma (P W 9), the Officer-in-charge of the Police station, Thoubal, left for the house of Modun where he prepared the inquest report and the injury statement respecting the deceased Tongdar Modun Maring produced the sickle M O 1 before the Investigating Officer and the latter made the same into a sealed parcel though he saw no stain of blood on the weapon It is part of the prosecution story that the weapon had been washed clean of blood by the time it was made over to the Investigating Officer From the house of Modun, the Investigating Officer went to the place of occurrence That place was also found to have been washed with water Thereafter, the Investigating Officer returned to the Police station, having brought the dead body with him. On the next morning, the dead body was sent to Imphal for post-mortem examination Before returning to the Police station, the Investigating Officer happened to arrest the accused from the house of her husband Modun

5. The post-mortem examination was done by Doctor A Jugeswar Singh (P W 5) at 11-00 a.m. on 25-11-1967 He noticed 3 incised wounds on the hands, one incised wound in the right lumber region, one irregular wound 1½" x 1"

peritoneum deep in the epigastrium on external examination Internally, he noticed two peritoneum wounds through the entire thickness of the liver The portal vein of the liver had also been cut The witness testified that the cause of death was shock born of puncture of liver and cutting of the portal vein The abdominal injury puncturing the liver, the witness affirmed, was enough to cause death in a matter of few minutes All the injuries, he added, had been caused by some sharp edged weapon like the sickle M O 1. The injuries other than those in the liver were of minor consequence

6. The accused was sent to the Judicial Magistrate Shri L R Singh on 25-11-1967 for recording her confessional statement The Magistrate deemed it prudent to give her two full days for reflection and so he sent her to Judicial lock-up On the 27th, she was again brought before him when he again took the precautionary measure of giving her an hour to think over the advisability of making the confession The accused exhibited willingness to make the confession, and after the Magistrate felt satisfied that she was out to make confession without any pressure, threat or inducement, he proceeded to record the same She affirmed that she was putting up with her husband and the latter's mother Tongdar in the same house There had developed some ill-feeling between her and her mother-in-law a few days before. On Friday (24-11-1967), her mother-in-law went to the hill Koiyam Konjun carrying a basket for collecting vegetables After a while she (accused) armed herself with an old sickle and went near her mother-in-law The latter was then busy collecting vegetables She killed her mother-in-law by stabbing her with sickle and then set out homeward She told her husband on meeting him on the way that she had killed his mother Her husband then left, in company with some other persons, for the hill from where they brought the dead body of Tongdar

7. On conclusion of the investigations, Shri Sen Sarma (P W 9) submitted the charge-sheet to the Magistrate, who after holding the inquiry committed Tomeiren to stand trial on the charge under Section 302 I.P.C Tomeiren entered the plea of not guilty She however did not examine any witness in defence

8. The learned Sessions Judge found, on the basis of the material on record, that it was the accused who had stabbed Tongdar to death with the sickle M O 1 He believed Modun on the point that his wife had confessed the guilt before him The Sessions Judge was also of the opinion that the confession recorded in Ex P/7 had been voluntarily made by the accused and that what she had stated

therein represented a truthful picture of how Tongdar had been murdered. He, therefore, convicted Tomeiren under Section 302, I.P.C. and sentenced her to death on holding that the murder was deliberate as well as brutal.

9. The outstanding piece of evidence against the accused is her own confessional statement Ext. P/7. It is correct that she retracted that confession at the trial. This retraction came so belatedly that no importance can be attached to that circumstance. It has to be emphasised that during inquiry before the Committing Magistrate the accused admitted unequivocally that she has made the confessional statement. She also happened to admit before that Magistrate that her mother-in-law had gone to the hill at 6-00 a. m. for collecting vegetables, that an hour thereafter when her husband went to his paddy field she met him on the way armed with a blood stained sickle, that she told her husband that she had killed his mother, that her husband snatched the sickle from her hand and raised hue and cry, that some persons collected at the spot, and that they all went to the place of occurrence and from there brought the dead body of Tongdar. The statement made by the accused before the Committing Magistrate was tendered by the prosecutor at the trial, and according to Section 287 it has to be read as evidence.

The Supreme Court held in the case of *Hate Singh v. State of Madhya Bharat*, AIR 1953 SC 468, while interpreting that section, that the statement made by the accused before the Committing Magistrate must be treated like any other piece of evidence coming from the mouth of a witness, and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. AIR 1955 Patna 428, *Andu Mushar v. The State*, is an authority for the proposition that Section 287 does not impose any qualification with regard to the word "evidence", and it is difficult to interpret the section to mean that such statement should only be weighed to find if it is consistent with the innocence of the accused. There appears to be no scope, it was observed further, for putting a restricted meaning on the word "evidence" used in Section 287, and so it is open to the Court to make use of such statement as it does with any other evidence either for or against the accused.

In view of such interpretation of Section 287, the statement made by the accused before the Committing Magistrate affirming not only the correctness of the confessional statement Ext P/7 but also of the rest of the prosecution evidence, her stand at the trial that she had not made the confession recorded

in Ext. P/7 does not carry any weight. The testimony of Shri L. R. Singh (P.W. 6), who recorded the confession, shows that he was extra-cautious in warning the accused about the consequences flowing from the confessional statement, that he took all conceivable steps to find out if the accused were out to make a voluntary confession, and that he proceeded to record her confession only after he felt satisfied that it was voluntary. That confessional statement coupled with the admissions made by the accused before the Committing Magistrate leaves no scope for doubt that it was she and none else who was the murderer of Tongdar.

10. Modun Maring (P.W. 1), the husband of the accused, deposed at the trial that when he was proceeding to his field he saw his wife coming from the side of Kojam Konjin hill, that she carried a blood-stained sickle in her hand, and that she told him on her own that she had killed his mother with that sickle at Kojam Konjin hill. The examination-in-chief of Modun was done on 28th October 1968 and it having gone late in the evening the case was adjourned to the next day for cross-examination. On the latter day, he went back on his statement made in examination-in-chief by deposing that what he had stated on the 28th was false. At that stage he was declared hostile at the instance of the Prosecutor and the latter happened to cross-examine him. During the course of that cross-examination he re-affirmed all that he had mentioned in his examination-in-chief. Significantly enough, no cross-examination was done on him thereafter by the defence counsel.

The Sessions Judge also brought on his record the statement made by Modun before the Committing Magistrate. This was done in terms of Section 288 Cr P C which provides that the evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act. The statement made before the Committing Magistrate by the witness corresponds with what he deposed at the trial during examination-in-chief and during cross-examination by the Prosecutor. Therefore, I have no doubt that what he affirmed before the Committing Magistrate was a truthful version of the occurrence. He put the matter beyond controversy by affirming at the trial during cross-examination by the Prosecutor that he had wavered during cross-examination by the defence counsel because he "wanted to save the life of his wife if he could". He admitted that after the accused had been released on bail she had been living with him. In

such circumstances, it was not abnormal for him to yield to the entreaties of his wife who was clearly apprehended that she may have to mount the gallows for the heinous offence committed by her. The statement of Modun that when he snatched the sickle M.O. 1 from the hand of the accused it was stained with blood, constitute enough of corroboration of the confessional statement made by the accused. The extra-judicial confession made by Tomeiren to her husband is another corroborative piece of evidence. Taking all the circumstances into consideration, I feel no doubt in my mind that it was accused who had murdered Tongdar. I would, therefore, confirm her conviction under Section 302 IPC.

11. The only serious question debated in this Court related to the appropriate sentence that should be awarded to Tomeiren. It was urged by Shri Benoy Singh that since there is no motive assigned to Tomeiren for committing the murder, it is conceivable that some conflict between the two women arose at the spot and Tomeiren committed the murder of her mother-in-law on spur of the moment having been provoked by some act on the part of the latter. Shri Munindrakumar Singh submitted, on the other hand, that motive for the murder is plainly deducible from the confessional statement Ext P/7 wherein it is mentioned that some ill-feeling had developed between Tomeiren and her mother-in-law a few days before the fateful occurrence, and that in consequence it is a case where capital sentence is clearly called for. It is correct that in the confessional statement Tomeiren happened to affirm that ill-feeling had been created between her and her mother-in-law since a few days before 24-11-1967. However, corroboration of that fact is not available from any other evidence on the record. Modun, the husband of the appellant, specifically denied that there was any ill-feeling between his wife and his mother. None of the other witnesses examined by the prosecution referred to this aspect of the case. Therefore, it is not possible to record a firm conclusion that what weighed with Tomeiren in murdering her mother-in-law was ill-feeling that had cropped up, according to the recitals in Ext P/7, between her and the deceased.

It was held in the case of *Mi She Yi v Emperor*, AIR 1924 Rang 179, that an accused person is entitled to the benefit of doubt in the matter of sentence as in the matter of conviction, AIR 1936 Rang 1. *Nga Kan v Emperor*, is an authority for the proposition that where there is considerable doubt about the cause of the quarrel which resulted in the murder, the extreme penalty of the law is not called for. In this Rangoon case, the High Court was unable to make up its

mind as to what had led to the fight between the appellant and the deceased and for that reason, coupled with the fact that the appellant was a young person of 17 or 18 years, the sentence of death was reduced to one of transportation for life.

In the case of *Ouseph v State*, AIR 1953 Trav Co 561, the proposition enunciated was that in the absence of evidence as to the exact circumstances under which the assault commenced, it would not be safe to impose the extreme penalty of law. What was proved in this case was that the culprit had developed intimacy with a woman although his wife was alive and he had three children. On the night of occurrence the convict came to the house of his wife and after he had shared the bed with her for sometime he took her out in the compound and there opened the assault on her with a penknife. The victim yelled for help and two of her children rushed to the place. They found that their mother was lying on her back while the father was sitting on her chest and cutting her throat. The children raised an outcry and that made the culprit take to heels. The Sessions Judge imposed on the convict the lesser penalty for the reason that there was lack of evidence to establish the exact circumstances under which the assault had started. The High Court agreed with that view of the Sessions Judge and happened to observe:

"No doubt the nature of the injuries speaks volumes about the intention of the culprit but an accused person is entitled to the benefit of doubt even in the matter of sentence."

Two clear propositions appear to emerge from this case, they being that if the exact circumstances under which the life of the victim was taken are not clear then the lesser sentence of life imprisonment should be imposed, and that the principle of benefit of doubt is available to the accused not only in the matter of conviction but also in the matter of sentence. In the case of *Gurdev Singh v. Emperor*, AIR 1948 Lah 58, it was observed that there are well recognized grounds on proof of which the Judge would be justified in withholding the capital sentence. It was stated further that it is impossible to lay down any general rule defining the classes of cases in which the lesser sentence may be imposed though from time to time certain circumstances have been recognized by the Judges who had to consider this question as valid grounds for imposing such sentence. I think the rule laid down in the two Rangoon cases and in the Travancore Cochin case cited above furnishes sufficient guidance for the purpose of the case in hand. As held above, it cannot be stated with definiteness what led to the murder of Tongdar. Hence, giving

the accused the benefit of doubt I have decided to reduce her sentence to one of life imprisonment. Reference made by the learned Sessions Judge for confirmation of sentence of death is consequently rejected. I confirm the conviction of Tomeiren under Section 302 I.P.C. but on accepting her appeal partly, reduce the sentence to that of life imprisonment.

Order accordingly.

1970 CRI. L. J. 553 (Vol. 76, C. N. 129)

PUNJAB & HARYANA HIGH COURT)

INDRA LAL AND A. D. KOSHAL, JJ.

Municipal Committee, Amritsar, through Executive Officer, Appellant v. Shri Labhu Ram and others, Respondents.

Criminal Appeal No. 1028 of 1966, D/- 5-5-1969, against Order of Magistrate 1st Class Amritsar, D/- 18-12-1963.

(A) Criminal P. C. (1898), Ss. 173 (4), 251-A (1), 204 (1-B) and 4 (1) (h) — Case instituted upon complaint — Documents appended to complaint or relied in support thereof — Complainant not bound to furnish accused with copies of such documents.

In a case instituted upon a complaint it is not binding on the complainant to furnish the accused with documents appended to complaint or relied upon in support thereof. An order of Court, therefore, directing complainant to furnish copies of the documents is vitiated by serious error of law. (Paras 8 & 9)

The Code makes a distinction between cases instituted upon police reports and those instituted upon complaints in the matter of supply of copies of documents relied upon by the prosecution and that such documents cannot be considered part of the complaint in cases of the latter type. (Para 6)

In respect of a case instituted upon a police report the special provisions have been made in Section 173 (4) and 251-A (1) for furnishing copies of such documents to the accused, by the Code of Criminal Procedure (Amendment) Act 1955 but a similar provision was not enacted in respect of documents appended to a complaint or relied upon in support thereof by the complainant. Had the Legislature intended to treat a complaint at par with a police report in this behalf, there is no reason why similar provisions should not have been specifically made part of the Code with regard to cases instituted on complaints. (Para 7)

It is true that in a proceeding instituted on a complaint in writing, a copy of such complaint has to accompany the summons or warrant issued to the accused with a view to enforce his appearance in Court

but then it cannot be said that a complainant is bound either by virtue of an express provision of law or by necessary implication to furnish to the accused copies of documents produced by him along with the complaint or relied by him in support thereof. (Para 7)

(B) Criminal P. C. (1898), S. 245 — Offence under S. 78 of Punjab Municipal Act (1911) and R. V. 65 of Punjab Accounts Code — Triable as summons case — There can be no order of discharge — Order of discharge, however, cannot be set aside on that ground alone — Order of discharge may be treated as an order of acquittal. (Para 5)

(C) Criminal P. C. (1898), S. 423 — Appeal against acquittal — Power to order retrial — Order of acquittal vitiated by serious error of law — Proceedings against accused continued for ten years keeping accused in suspense — Retrial not ordered as fresh trial will not be conducive to justice. AIR 1955 SC 792, Foll. (Para 9)

Cases Referred: Chronological Paras

(1958) AIR 1958 Andh Pra 568 (V 45) = 1958 Cri LJ 1117, Thota Ramalingeswara Rao v. State of Andhra Pradesh	4.
(1958) AIR 1958 Punj 172 (V 45) = 1958 Cri LJ 683, Ram Krishna Dalmia v. State	4.
(1957) AIR 1957 Mad 508 (V 44) = 1957 Cri LJ 866, In re, Rangaswami Goundan	4
(1956) AIR 1956 Madh Bha 17 (V 43) = 1956 Cri LJ 66, Hariram v. State	8
(1955) AIR 1955 SC 792 (V 42) = 1955 Cri LJ 1644, Machander v. State of Hyderabad	9
(1947) AIR 1947 PC 67 (V 34) = 48 Cri LJ 533, Pulukuri Kottaya v. Emperor	4

J. S. Shahpuri, with M. S. Chadha, for Appellant; Roop Chand with S. S. Mahajan, for Respondent No. 1; Sardul Singh, for Respondents Nos. 2 and 3.

A. D. KOSHAL, J.:— By this judgment we shall dispose of fourteen appeals (Criminal Appeals Nos. 1028 to 1041 of 1966) which are directed against a similar number of orders, all dated the 18th of December, 1963, passed by Shri N. K. Jain, Magistrate 1st Class, Amritsar, in the same number of complaints instituted by the Municipal Committee, Amritsar (hereinafter to be referred to as the Committee), each for an offence under Section 78 of the Punjab Municipal Act, 1911, and R. V. 65 of the Punjab Municipal Account Code, the order in each case being that the accused persons concerned be "discharged".

2. The allegations made in the complaints mentioned above were identical

except for the number and names of the accused persons in each of them and may be stated thus In demi-official letter No XIII (39)-Vol III/722 dated the 8th of April, 1959, addressed to the Executive Officer of the Committee, Shri Lakhi Singh, Examiner, Local Fund Accounts, Punjab, Jullundur, stated that considerable quantities of sugar had been imported into the Amritsar municipal limits without payment of octroi duty. The Committee passed resolution No 52 dated the 9th of April, 1959, in pursuance of which the matter was reported to the police who held investigations and informed the Committee by means of a letter dated the 19th of July, 1961, that an offence under Section 78 of the Punjab Municipal Act had been committed by the persons accused in each of the complaints mentioned above but that it was a non-cognisable offence, judicial action in regard to which could be taken only on a complaint filed by the Committee before the Court having jurisdiction This letter was based on the report prepared by the police (as a result of the investigation) in which the details of the consignments of sugar imported into the Amritsar municipal limits as also of the octroi duty evaded on various occasions were given Accused No 1 (who is a different person or firm in each of the 14 cases) was the person or firm, according to the findings of the police, who had bought sugar from various mills and had brought the same to the Bhagtanwala Railway Station, Amritsar, under different railway receipts, the details whereof appeared in the police report He deputed Sant Singh, a Station Broker working at the Bhagtanwala Railway Station (who figures as respondent No 3 in Appeals Nos 1028 to 1033 and 1039 to 1041, as respondent No 6 in Appeal No 1034, as respondent No 8 in Appeal No 1035, as respondent No 4 in Appeal No 1036 and as respondent No 5 in Appeals Nos 1037 and 1038) to take delivery of the sugar so imported which was intended for consumption, use or sale within the said municipal limits Sant Singh was bound under Rules V 23 and V 24 of the Municipal Account Code to present the railway receipts in question at the railway barrier and to make payment of the octroi duty due on the goods covered by them before taking delivery thereof but he obtained such delivery without doing any such thing so that accused No 1 and Sant Singh were guilty of offences under Rule V 65 of the Municipal Account Code Besides, accused No 1, Sant Singh accused and the other accused had imported sugar within the octroi boundary of the Amritsar Municipality without payment of octroi duty and with the intention of defrauding the Committee and all of them had, therefore, committed an offence under Section 78 of the Punjab Municipal Act as per informa-

tion given by the police in their letter dated the 19th of July, 1961, above mentioned

3. A list of documents accompanied each of the fourteen complaints. The documents mentioned included the demi-official letter addressed by the Examiner, Local Fund Account, Punjab, to the Executive Officer of the Committee, resolution No 52 dated the 9th of April, 1959, passed by the Committee, the first information report made by the committee to the police, the report prepared by the police after investigation, the police investigation file, the records of the sugar mills concerned, the delivery registers maintained at the Bhagtanwala Railway Station and the railway receipts mentioned in the police report

4. Some of the accused persons in a few of the complaints came to a settlement with the Committee and were acquitted Some others could not be served and separate proceedings were directed to be taken against them On behalf of the other accused a request was made by their counsel that copies of all the documents mentioned in the list appended to the complaints be made available to him This request was accepted by the trial Court and an order in accordance therewith was passed Later on, an objection was raised by the Committee that it was not bound to supply the copies but the trial Court did not vary its order and adjourned the cases a number of times in order to enable the Committee to supply the copies Ultimately, the trial Court held in the impugned orders that the Committee had no desire to prosecute the accused persons inasmuch as it had failed to supply the copies which it was its duty to supply for the following reasons —

(1) Under Section 204 (1-B) of the Code of Criminal Procedure accused persons are entitled to copies of the complaint and documents attached to a complaint are part thereof

(2) Documents relied upon by the prosecution, especially in cases investigated by the police are part of the complaint

(3) Section 173 of the Code of Criminal Procedure provides for the supply of documents to accused persons in cases investigated by police officers See also *Ram Krishna Dalmia v State*, AIR 1958 Punj 172, *Thota Ramalingeswara Rao v State of Andhra Pradesh*, AIR 1958 Andh Pra 568, *In re Rangaswami Goundan*, AIR 1957 Mad 508, and *Pulukutti Kottaya v Emperor*, AIR 1947 PC 67

(4) The Committee had failed to furnish the copies in spite of a direction by the Court to obey which it had sufficient opportunity and to have which set aside in appeal it took no steps

In this view of the matter the trial Court held that the sole purpose of the

prosecution appeared to be to cause harassment to the accused persons whom it, therefore, "discharged".

5. The first point raised by learned counsel for the Committee was that all the 14 cases fell within the category of summons-cases in relation to which the Code of Criminal Procedure does not envisage an order of discharge in any event and that the impugned orders were liable to be set aside on that account alone. To the first part of this contention no exception can be taken as Chapter XX of the Code, which deals with the trial of summons-cases, does not talk of an order of discharge at all. On the other hand, it is clear from the provisions thereof that the proceedings against an accused person in a summons-case can end only in two ways, i.e., either in his conviction or his acquittal. The second part of the contention, however, does not commend itself to us as it is well recognised that an order of "discharge" passed in such circumstances would amount to one of acquittal and may be treated as such. The contention, therefore, does not help the Committee in any way.

6. Learned counsel for the Committee then challenged the impugned orders with the contention that the cases dealt with by the trial Court were summons-cases instituted on complaints, that the provisions of Section 173 of the Code of Criminal Procedure were wholly inapplicable to such cases, that the Code made a distinction between cases instituted upon police reports and those instituted upon complaints in the matter of supply of copies of documents relied upon by the prosecution and that such documents could not be considered part of the complaint in cases of the latter type. With this contention we find ourselves in full agreement and for the reasons hereafter appearing have no hesitation in holding that the trial Court fell into a serious error of law in dismissing the complaints with an order of "discharge".

7. The provisions of Sections 4 (1) (h), 173 (4), 204 (1-B), 251 and 251-A (1) of the Code of Criminal Procedure are relevant and may be quoted here for facility of reference.

"4 (1) (h) 'complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police-officer."

"173 (4) After forwarding a report under this section, the officer in charge of the police station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of

the first information report recorded under Section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under Section 164 and the statements recorded under sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

"204 (1B) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint."

"251 In the trial of warrant cases by Magistrates, the Magistrate shall,—

(a) in any case instituted on a police report, follow the procedure specified in Section 251-A, and

(b) in any other case, follow the procedure specified in the other provisions of this Chapter."

"251-A (1) When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished."

A perusal of these provisions leaves no room for doubt that a police report requesting a Magistrate to take cognisance of an offence under the Code of Criminal Procedure is treated as something apart from the documents on which that report may be based or which may have been relied upon by the police in support thereof and that special provisions have been made in Sections 173 (4) and 251-A (1) for furnishing copies of such documents to the accused. These provisions were introduced by the Code of Criminal Procedure (Amendment) Act, 1955 but a similar provision was not enacted in respect of documents appended to a complaint or relied upon in support thereof by the complainant. Had the Legislature intended to treat a complaint at par with a police report in this behalf, there is no reason why similar provisions should not have been specifically made part of the Code with regard to cases instituted on complaints.

It is true that in a proceeding instituted on a complaint in writing, a copy of such complaint has to accompany the summons or warrant issued to the accused with a view to enforce his appearance in Court but then it cannot be said that a complainant is bound either by virtue of an express provision of law or by necessary implication to furnish to the accused copies of documents produced by him along

with the complaint or relied by him in support thereof. The assumption made by the learned trial Magistrate that such documents are part of the complaint appears to us to be without justification in view of the definition of "complaint" appearing in Section 4 (1) (h). For a document to come within the ambit of that section only the following three (four?) conditions have to be satisfied —

- (i) It must be made to a Magistrate,
- (ii) it must be made with a view to his taking action under the Code;
- (iii) it must contain an allegation that some person whether known or unknown has committed an offence; and
- (iv) it must not be the report of a police officer.

Each one of these conditions is fulfilled in the case of every one of the 14 complaints in question and the first two of them are not satisfied in the case of the documents relied upon by the Committee even though such documents may be containing important details of the manner in which the offences complained of were committed and in spite of the fact that a reference to some of those documents appears in the complaint itself

8. The authorities relied on by the trial Magistrate are wholly inapplicable to the facts of the cases before us. The first three of them covered cases instituted on police reports and no question arose therein of the applicability or the adoption of the procedure provided for in Section 173 to or in cases instituted upon complaints. The Privy Council authority cited related to a case in which copies of statements made by prosecution witnesses to the Investigating Officer were not furnished to the accused. Their Lordships held that Section 162 of the Code of Criminal Procedure gave to the accused a right to have such copies and that such right was a very valuable one. Everyone of these authorities, therefore, is irrelevant for the purpose of the decision of the question before us inasmuch as Sections 162(251-A?) and 173 of the Code specifically give the accused a right to have copies of certain documents in cases instituted upon police reports while the situation, as we have already seen, is entirely different in cases instituted upon complaints. Learned counsel for the respondents did not seek to justify the reliance placed by the trial Court on the four authorities just discussed but urged that it had rightly held the documents in question to be part of the complaints (an argument which we have already repelled) and that the trial Court must in any case be held to have exercised its inherent powers of passing of such orders as may be necessary for advancing the cause of justice. He has relied upon *Hariram v. State*, AIR 1956 Madh Bha 17, for the proposi-

tion that in spite of the fact that Section 561-A of the Code of Criminal Procedure saves the inherent powers of the High Courts alone, Courts subordinate to the High Courts cannot be deemed to have been divested of those powers by reason of the fact that no similar provision exists in their case. In these proceedings, however, we need not go into the question decided in the authority just mentioned as we were clearly of the opinion that the trial Court had no inherent power to direct the Committee to furnish copies of the documents relied upon by it to the accused. It is true that there is no express prohibition in the Code in the matter of supply of copies in complaint cases but then such a prohibition must be held to have been necessarily intended by the Legislature by reason of the introduction of 1956 of the provisions of Sections 173 (a) and 251A (1) and of the absence of similar provisions in relation to cases instituted on complaints.

9. For the reasons stated, we hold that the impugned orders are vitiated by a serious error of law. Ordinarily we would set them aside and order a retrial but the adoption of such a course does not appear to be appropriate because of the circumstance that since the cases were made over to the police by the Committee in 1959 the proceedings against the respondents have gone on for about 10 years during which period the respondents have suffered from suspense and it would not be conducive to justice if the proceedings are started afresh. In this connection we may refer with advantage to the following observations of their Lordships of the Supreme Court in *Machander v. State of Hyderabad*, AIR 1955 SC 792 —

"Justice is not one-sided. It has many facets and we have to draw a nice balance between conflicting rights and duties. While it is incumbent on us to see that the guilty do not escape it is even more necessary to see that persons accused of crime are not indefinitely harassed. They must be given a fair and impartial trial and while every reasonable latitude must be given to those concerned with the detection of crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go.

Except in clear cases of guilt, where the error is purely technical, the forces that are arrayed against the accused should no more be permitted in special appeal to repair the effects of their bungling than an accused should be permitted to repair gaps in his defence which he could and ought to have made good in the lower Courts. The scales of justice must be kept on an even balance whether for the accused or against him, whether in favour of the State or not

and one broad rule must apply in all cases."

The accused in that case whose trial for murder was held to have been vitiated by reason of material circumstances appearing in the evidence against him not having been put to him under Section 342 of the Code of Criminal Procedure was acquitted, their Lordships not being prepared to order retrial in view of the fact that the proceedings had continued already for 4½ years

10. In view of what we have said, we hold the impugned orders to be vitiated by a serious error of law but refuse to set them aside. In consequence, all the fourteen appeals are dismissed

11. JINDRA LAL, J.:— I agree.

Appeals dismissed.

1970 CRI. L. J. 557 (Vol. 76, C. N. 130)

(MYSORE HIGH COURT)

SOMNATH IYER, C. J.

Sri Nagappa Dattatrava Ankolekar,
Accused-Petitioner v. State of Mysore,
Complainant-Respondent

Criminal Revn. Petn No 228 of 1969,
D/- 27-11-1969, against judgment of 1st
Addl. S. J., Dharwar, D/- 27-3-1969.

Prevention of Food Adulteration Act (1954), Ss. 7, 2(v) — Adulteration in long bason — Long bason not being used for human consumption, adulteration is not an offence under Section 7.

Section 7 punishes adulteration of food as defined in S 2(v) and not the adulteration of other substances. Unless the substance which is adulterated is a substance used as food or drink for human consumption, the adulteration is not an offence under S. 7. (Paras 3, 4)

Where the accused was charged for adulteration in long bason, which is not food used for human consumption and is a substance used in the place of soap or soap nut powder or as cattle feed, the adulteration was not an offence within meaning of S 7. (Paras 5, 6)

A. K. Lakshmeswar, for Petitioner;
L G Havanoor H C Govt Pleader and
State Public Prosecutor, for Respondent.

ORDER:— The charge against the accused was that he had adulterated an article of food and so committed an offence punishable under Section 7(1) of the Prevention of Food Adulteration Act, 1954, which reads:

"7. No person shall himself or by any person on his behalf manufacture for sale, or store, sell, or distribute —

(i) any adulterated food;

xx x xx"

2. P.W. 1 Shivappa gave evidence that he purchased 600 gms. of a substance called long bason from the accused and that its analysis revealed that the substance so purchased was an admixture of long bason and Kesari Dal. The report of the analyst establishes beyond doubt that what was sold by the accused to P.W. 1 was adulterated long bason.

3. But Section 7 of the Prevention of Food Adulteration Act punishes adulteration of food and not the adulteration of other substances and food is defined by Section 2(v) of the Act thus:

"(v) 'food' means any article used as food or drink for human consumption other than drugs and water and includes--

(a) any article which ordinarily entered into, or is used in the composition or preparation of human food, and

(b) any flavouring matter or condiments".

4. So, unless the substance which is adulterated is a substance used as food or drink for human consumption, the adulteration is not an offence under Section 7 of the Act.

5. P.W. 1 admitted that long bason is used for the same purpose for which soap-nut powder was used and that it was also used as cattle feed. He gave no evidence that long bason is used for human consumption. That being so, the essential ingredient, the establishment of which is imperative under Section 7 of the Act, did not exist in the present case

6. Moreover, the evidence of P. W. 2 Patil makes it clear that when P.W. 1 purchased long bason from the accused, he did not purchase what was sold by the accused as an article of food, and that being so, if long bason is not food used for human consumption and is a substance used in the place of soap or soap-nut powder or as cattle feed, the adulteration is not an offence under Section 7 of the Act. It is on this short ground that I allow this revision petition and set aside the conviction of the petitioner and the sentence imposed on him. The fine if paid will be refunded.

Revision allowed.

1970 CRI. L. J. 558 (Vol. 76, C. N. 131)

(RAJASTHAN HIGH COURT)

L S MEHTA AND C M LODHA, JJ.

State, Petitioner v. Sardara Singh and others, Respondents

Criminal Appeal No. 459 of 1965, D/- 1-3-1968, against Judgment of S. J., Ganaganagar, D/- 16-4-1965

(A) Evidence Act (1872), S. 3 — Criminal P. C. (1898), Ss. 162, 367 — Appreciation of evidence — Contradictory statements if not explained may be ignored.

Contradictory statements at various stages of the case not only affect reliability but also create (serious difficulties for the court to arrive) at the truth. If the contradictory statements are not explained in a reasonable manner and have been made deliberately and motivated by improper and ulterior consideration, they run the risk of being completely ignored.

(Para 7)

(B) Criminal P. C. (1898), S. 367 — Appreciation of evidence — Suspicion, however strong cannot replace proof — Evidence Act (1872), S. 3.

Unless there is a definite, positive, legal, unimpeachable and reliable evidence, the accused, in a serious case cannot be convicted. In a criminal case, mere suspicion, however, strong, cannot take the place of proof.

(Para 7)

(C) Criminal P. C. (1898), Ss. 173 (4), 161, 162, 207-A (3) — Copies of statements and reports, to be supplied to accused — Object is to keep accused fully informed — Failure to supply copies is fatal to prosecution — Witnesses' statements recorded by two officers — Copies of both must be supplied.

The provisions relating to recording of statement of witnesses and supplying of the copies provide a valuable safeguard to the accused, so that they may be utilised at the trial for preparing effective defence. Such a request cannot be normally whittled down. Where the circumstances are such that the court may reasonably infer that prejudice has resulted to the accused from the failure of supplying of the copies of the statements recorded under S 161, Cr P. C the court is justified in directing that the conviction should be set aside. The object of Ss 162, 173(4) and 207-A(3), Cr P C is to enable the accused to obtain a clear picture of the case against him. The sections impose an obligation upon the prosecution agency to supply copies of the statements of witnesses who are intended to be examined at the trial to enable the accused to utilise them in the course of cross-examination to establish such defence as may be desired to put up and also to shake the testimony of the witnesses. If in a case statements of wit-

nesses were first recorded by the investigating officer and again by a senior officer, copies of both should be supplied to the accused. AIR 1964 SC 286, Rel on

(Para 8)

(D) Criminal P. C. (1898), S. 367 — Appreciation of evidence — Recovery of blood-stained clothes from accused does not prove case against him. It has only corroborative value—Evidence Act (1872), Ss. 3, 114.

The recovery of the blood-stained articles from an accused can be used to corroborate other evidence. It cannot by itself prove the case of the prosecution. It is possible to imagine on many an occasion where the mere discovery of a blood stained article is due to something other than murder, for instance, concealing the dead body or receiving from the real murderer a blood stained article and so on. It is, therefore, impossible, to say that mere recovery of a blood stained article is enough by itself to justify a conviction for murder.

(Para 9)

(E) Criminal P. C. (1898), Ss. 342, 537 — Examination of an accused is to afford opportunity to explain evidence against him — Test of fair examination explained — Duty of counsel to satisfy court that improper examination has resulted in miscarriage of justice.

The examination of the accused person under S 342 Cr P C is intended to give him opportunity to explain any circumstances appearing in the evidence against him. The ultimate test in determining whether or not the accused has been fairly examined under S 342 Cr P C is to infer whether, having regard to all the questions put to him, he had had an opportunity to say what he wanted to say in respect of the prosecution case against him. Where the accused is represented by a counsel at the trial and in an appeal, it is upto the accused or his counsel in such cases to satisfy the court that such inadequate examination has resulted in the miscarriage of justice. If the counsel is unable to say how his client had been prejudiced and if all that he could urge is that there was a possibility of prejudice having been caused to his client, that alone is not enough. It cannot be said as a matter of law that the non-examination or inadequate examination under S 342, Cr P C must be presumed to have caused prejudice. The question of prejudice is a matter of inference based on facts and the surrounding circumstances in each case. AIR 1956 SC 536, Rel on.

(Para 10)

(F) Criminal P. C. (1898), Ss. 252, 286 — Evidence in murder case — All eye-witnesses should be examined by prosecution — Deliberately withholding material witnesses is a serious infirmity — Evidence Act (1872), S. 114.

In a murder case, the prosecutor is expected to act fairly and honestly and must not withhold material witnesses simply for the reason that their evidence is likely to go against him. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed the incident, but normally he has to examine all the eye-witnesses in support of his case. Where it is disclosed that material witnesses have been deliberately withheld, the court is justified in drawing an inference against the prosecution and may, hold that omission to examine such witnesses constitutes a serious infirmity. AIR 1965 SC 328, Rel on.

(Para 11)

(G) Criminal P. C. (1898), Ss. 417, 423 — Appeal against acquittal by State — Possibility of High Court taking a different view of evidence is not enough — Compelling reasons to hold that acquittal was wrong must be there — Factors to be construed in favour of accused explained.

In an appeal by the State Government under S. 417 Cr. P. C., against the acquittal, it is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the finding of the trial Court was not sound. If it is found that the trial Court adopted a reasonable course and took plausible view of the matter, interference under S. 417, Cr. P. C., is not justifiable. The reason is manifest. There are two important factors in every criminal case which have to be kept in view in favour of an accused person; one is that the accused can always claim benefit of reasonable doubt and the other is that when an accused person offers a reasonable explanation of his conduct, then, even though his defence is not satisfactorily proved, it ought to be normally accepted unless circumstances warrant that it is false.

(Para 12)

Cases Referred: Chronological Paras

1965) AIR 1955 SC 328 (V 52)=

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Chowdhary v State of W B 10

Govindmal Mehta, Dy Govt Advocate, for Petitioner; S R Singh and Dayal Singh, for Respondents

L. S. MEHTA, J.:— There is a village Jagte-wala, Chak No 27 H in Tehsil Karanpur, District Ganganagar. In this village the accused Sardara Singh, Kela Singh, Jaila Singh and Pal Singh possessed certain Murrabas of land. Lal Singh and his son Jagtar Singh deceased also owned certain Murrabas there. All the

accused were the real brothers of Lal Singh deceased. Their lands were, however, partitioned a few years back. Some litigation had been going on between Sardara Singh, Kela Singh, Jaila Singh and Pal Singh on the one hand and Lal Singh on the other about water. On June 17, 1964, at 11 a.m., when Mst. Punjab Kaur, wife of deceased Lal Singh, was coming with her son, Mukhtiar Singh, from her fields, Sardara Singh gave her a lathi blow on her leg at a distance of about 8 furlongs from the village Jagte-wala, Mst. Punjab Kaur made a report of this happening (Ex. P-19) at the Police Station, Keshrisinghpura, that very day at 7-30 a.m. Next day, i.e., on June 18, 1964, Lal Singh had to take water from the canal for irrigating his land. He accompanied by his sons, Jagtar Singh, aged 17 years, and Mukhtiar Singh, aged 14 years, went to his field early in the morning i.e., an hour before sun rise. Sardara Singh had already diverted water to his own land 5 minutes prior to the arrival of Lal Singh on his field. Lal Singh objected to it. Thereupon Sardara Singh and Jaila Singh beat him with Kassis. Kela Singh and Pal Singh also inflicted injuries to Jagtar Singh with Kassis. Sardara Singh gave one Kassi blow with its handle to Mukhtiar Singh.

In the meantime Mst Punjab Kaur reached there. It is said that she brought tea from her house for her husband. She is alleged to have witnessed the occurrence. As soon as Mst Punjab Kaur reached the place, she raised hue and cry as a result of which Kela Singh and Pal Singh ran away across the railway line and Jaila Singh and Sardara Singh took to their heels towards the village Jagte-wala. Injured Lal Singh had already been thrown into a 'Khala' (water channel) by the accused. His body was taken out of the 'Khala' by Mst Punjab Kaur, Mukhtiar Singh and others. Jagtar Singh was lying outside the 'Khala'. Mukhtiar Singh then went to Dalpatsinghpura to inform the Patwari of the village, but he was not available there. Mukhtiar Singh apprised Mehar Singh, a resident of Dalpatsinghpura, DW 1, of the happening. Soon after Mehar Singh rushed up to the spot. Mukhtiar Singh brought a cart from his house. The dead bodies of Lal Singh and Jagtar Singh were loaded on the cart and then they were taken to their house in the village Jagte-wala. Mst Punjab Kaur went to the Police Station, Keshrisinghpura, to lodge a report. Arjun Singh accompanied her up to the Police Station.

The Station House Officer, Shankerlal, P.W. 5, recorded the first information report Ex. P-1 on June 18, 1964, at 11-15 a.m. Later on the S.H.O., Shankerlal went to the spot. He prepared the inquest report Ex. P-3, seizure memos of

the blood-stained clothes of Lal Singh and Jagtar Singh, Exs P-5 and P-6 respectively. He collected sand, stained with blood, from the spot under memo Ex P-7. He also prepared the site plan Ex P-8. Blood-stained shirt Ex 1 and Gamcha Ex 2 were recovered from the possession of Sardara Singh under the memo Ex P-9, on June 18, 1964. These clothes were duly sealed. They were sent to the Chemical Examiner, Government of Rajasthan, Jaipur. The Chemical Examiner (vide Ex P-26) reported that these clothes were positive for blood. Cuttings of the articles were then sent to the Serologist and the Chemical Examiner to the Government of India, Calcutta, who reported that they were stained with human blood. vide Ex P-27.

The dead bodies of Lal Singh and Jagtar Singh were sent for post-mortem examination to the Medical Officer, I/C Government Dispensary, Gulabewala. Dr G S Grewal, PW 2 conducted the post-mortem examination of the dead body of Lal Singh. He found the following injuries—

(1) Incised wound $2\frac{1}{2}'' \times \frac{1}{2}'' \times$ cavity deep tapering at the edge on the left forehead. Its anterior end was at the inner end of the left eye-brow.

(2) Incised wounds $4'' \times \frac{1}{2}'' \times$ cavity deep on the left side of the scalp parietal region. Its anterior end was reaching the frontal region and posterior end was reaching the middle line.

(3) Incised wound $3'' \times \frac{1}{4}'' \times$ cavity deep on the top of the skull left side $2\frac{1}{2}''$ from the middle line and parallel to it.

(4) Incised wound $1'' \times \frac{1}{8}''$ on the left cheek bone.

(5) Incised wound $1\frac{1}{2}'' \times \frac{1}{2}'' \times$ bone deep on the dorsum of the left wrist ulnar side below the medial epicondyle. It was transverse.

(6) Incised wound $\frac{1}{2}'' \times \frac{1}{4}'' \times \frac{1}{8}''$ transverse $1''$ in front of the left ear.

According to the Doctor, cause of death of Lal Singh was severe injuries inflicted on the vital organ of the brain, which was damaged badly.

He also performed the autopsy of the dead body of Jagtar Singh. He noticed the following injuries on his person—

(1) Incised wound $1\frac{1}{2}'' \times \frac{1}{2}'' \times$ cavity deep on the left side of occipital region.

(2) Incised wound $2\frac{1}{2}'' \times \frac{1}{4}'' \times$ cavity deep on the right parietal bone, its inner end was reaching the middle line.

(3) Incised wound $3'' \times \frac{1}{2}'' \times$ cavity deep on the right parietal bone parallel to the middle line.

(4) Incised wound $1'' \times \frac{1}{2}'' \times$ cavity deep at right angle to injury No. 3 at its lower end.

(5) Incised wound $\frac{3}{4}'' \times \frac{1}{2}'' \times$ cavity deep on the right parietal bone just below the parietal eminence.

According to the Doctor cause of death of Jagtar Singh was severe injuries to the brain, which was damaged very badly.

2. After necessary investigation, the Police put up a challan in the court of learned Sub-Divisional Magistrate, Karanpur, District Ganganagar. The said Magistrate made requisite inquiry and committed the case to the Court of learned Sessions Judge, Ganganagar, for trial. All the 4 accused, namely Sardara Singh, Kaila Singh, Jaila Singh and Pal Singh were charged under S 302, I.P.C., on February 15, 1965, to which they pleaded not guilty. In support of its case the prosecution examined 6 witnesses, namely, Kartar Singh (Motbir) PW 1, Mst Punjab Kaur (eye-witness) PW 2, D G S Grewal, PW 3, Mukhtiar Singh (eye-witness) PW 4, SHO Shankerlal, PW 5, and Patwari Sohanlal, PW 6. In his statement recorded under S. 342, Cr P. C., Sardara Singh said that he had diverted water to his field at 5-30 a.m., on the date of the occurrence. He arrived there 15 minutes before the scheduled time. He had found Jagtar Singh and Lal Singh dead. Thereupon, he went to Mst Punjab Kaur and Mukhtiar Singh and informed them of the happening. Later he went to the Police Station, Kersarsinghpura, and lodged report Ex P-19 that very day.

The rest of the accused pleaded alibi. In their defence, the accused examined DW 1 Mehar Singh and DW 2 Mukha Singh. The trial Court held that the two eye-witnesses, Mst Punjab Kaur PW 2, and her son Mukhtiar Singh, PW 4, reached the spot after the occurrence and were not present there at the time of the actual commission of the crime and, therefore, their testimony could not be said to be reliable in so far as complicity of the accused is concerned. The trial Court further held that mere production of Sardara Singh's blood-stained shirt Ex 1 and Gamcha Ex 2 was not sufficient to link him with the crime. There being no other evidence the court below acquitted all the 4 accused for offence under S 302, I.P.C.

3. Aggrieved against the above judgment, the State Government has filed the present appeal. Before the case was put up for hearing, Jaila Singh died. It was therefore, ordered that the appeal against the accused Jaila Singh stood abated. We are now concerned only with the appeal filed against Sardara Singh, Kela Singh and Pal Singh.

4. Contention of learned Deputy Government Advocate is that the trial Court went wrong in not relying upon the eye-witness account, furnished by Mst Punjab Kaur, PW 2, and Mukhtiar Singh, PW 4. Learned counsel for the State has further argued that the recovery of blood-stained shirt Ex. 1 and Gamcha Ex 2

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(30-9-1970)

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1970 Criminal Law Journal = Other Journals

CriLJ	Other Journals	CriLJ	Other Journals	CriLJ	Other Journals	CriLJ	Other Journals
1283	Allahabad H. C.	1316	con 1970 Mad L J	1350	AIR 1970 Guj 185	1396	con (1970) 2 S C J 29
1285	1970 All L J 711		(Cri) 549		10 Guj L R 659		1970 Mad L J
	1970 All W R	1318	16 Law Rep 346	1351	AIR 1970 Guj 186		(Cri) 419
	(HO) 465		1968 Mad L J	1359	AIR 1970 Guj 218	1401	AIR 1970 S C 1661
	1970 All Cri R 330		(Cri) 652	1365	AIR 1970 J & K 143		1970 Cur L J 511
1289	All. H. C.	1321	(1969) Mad L W	1369	AIR 1970 S C 1765		1970 S O D 581
1290	Andh. Pra. H. C.		(Cri) 210 (1)	1372	AIR 1970	1404	AIR 1970 S C 1664
1292	Assam L R (1969)		(1970) 1 Mad L J 410		Manipur 73		(1970) 2 S O J 134
	Assam 129		1970 Mad L J	1374	AIR 1970		1970 Mad L J
1293	Assam L R (1970)		(Cri) 289		Orissa 176		(Cri) 542
	Assam 92	1322	35 Cut L T 152		36 Cut L T 472	1407	AIR 1970 S C 1694
1294	1970 Maha L J 476	1323	1969 Pat L J R 257	1378	AIR 1970		1969 Ker L T 678
1296	72 Bom L R 164	1324	Tripura J. C.		Orissa 184		(1970) 2 S O J 358
	1970 Maha L J 285	1327	AIR 1970 Assam 121	1383	AIR 1970 Punjab 450	1415	AIR 1970 S C 1566
1298	Cal. H. C.		AIR 1970 Bom 333		1969 Cur L J 686	1422	AIR 1970 S C 1619
1302	72 Pun L R	1330	71 Bom L R 481	1386	AIR 1970		(1969) 2
	(D) 178		1969 Maha L J 859		Tripura 72		Um N P 178
1303	Delhi H. C.		ILR (1970) Bom 55	1389	AIR 1970 S C 1492		(1969) 2 S C R 289
1305	10 Guj L R 692	1334	AIR 1970 Cal 428	1391	AIR 1970 S C 1514		1970 M P W B 360
1308	Gujarat H. C.	1339	AIR 1970 Cal 435		1970 SC Cri R 422		1970 B L J R 417
1311	1970 Ker L J 137		78 Cal W N 1012	1396	AIR 1970 S C 1636		(1970) 2 S C J 293
1314	Kerala H. C.	1341	AIR 1970 Cal 437		(1969) 2		1970 M P L J 616
1316	(1970) 2 Mad L J 83	1344	AIR 1970 Cal 450		Um N P 332		(1970) 2 S C A 198
	1970 Mad L W	1346	AIR 1970 Delhi 188		(1969) 2 S C R 411		1970 Mad L J
	(Cri) 155	1348	AIR 1970 Guj 178		1970 B L J R 619		(Cri) 59

THE CRIMINAL PROCEDURE CODE

BY

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11th Edition (1969)

BY

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THE BOMBAY LAW REPORTER (Private) LTD.,

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recording of reasons for proceeding without obtaining the search warrant might not be done, which was a matter of discretion, so far as the requisition of the services of the respectable inhabitants was concerned the direction was mandatory and the legislature by insisting on the presence of one woman mediator at the time of search had undoubtedly chosen to safeguard the interests of the persons with whom the Act was intended to deal. In that case the services of a woman mediator had not been requisitioned at all. The search was held to be altogether illegal with the result that the accused person in that case was acquitted and his acquittal was upheld by the High Court.

4. In the present case two main defects have been pointed out in the matter of search; one is that the special police officer Shri Mankad has been found both by the Magistrate and the High Court to have prepared the document Ext. 8/A long after the search. As found by the High Court this document contained reproduction of Section 15 (1) and it hardly contained any ground on which the police officer had formed the belief with regard to the matters stated in sub-section (1). The other point which has been pressed on behalf of the appellant relates to contravention of sub-section (2) inasmuch as the panch witnesses were not inhabitants of the locality in which the appellant's house was situate. The High Court was of the view that power to conduct the search was derived from the statute and not from the recording of reasons and therefore the search was not rendered illegal, in the present case, on account of contravention of Section 15 (1) of the Act. On the second point it was held that there was no provision in law which rendered the evidence of the panch witnesses inadmissible even though Section 15 (2) had been contravened. The High Court did not agree with the decision of the Andhra Pradesh High Court that the directions contained in sub-section (2) were of a mandatory nature.

5. Our attention has been drawn to *State of Rajasthan v. Rehman*, (1960) 1 SCR 991 = (AIR 1960 SC 210) in which a Deputy Superintendent of Central Excise who had received information that the respondent in that case had cultivated tobacco but had not paid the excise duty, went to search his house. He was obstructed, while making the search with the result that he fell down and was injured. The respondent was prosecuted under Section 353, Indian Penal Code. It was

held that Section 165 of the Code of Criminal Procedure was applicable to such a search and the search being in contravention of that section it was illegal. The respondent therefore had been rightly acquitted. In this case, however, it was observed that the recording of reasons under Section 165 did not confer on the officer jurisdiction to make search though it is a necessary condition for doing so. Jurisdiction or power to make a search was conferred by the statute and not derived from the recording of reasons. These observations are sufficient to dispose of the first point which has been pressed about the omission to record the reasons before the search or even thereafter in a proper way. This case cannot be of much assistance to the appellant because no question is involved in the present case of any public servant having been obstructed in the course of a search conducted under Section 165 of the Criminal Procedure Code. The trial of the appellant was for contravention of certain provisions of the Act and the search was made in respect of those offences. The trial having taken place the question of the applicability of Sec. 537 of the Criminal Procedure Code will at once arise. If the non-observance of the provisions of Section 15 (2) is not an illegality but is a mere irregularity then the sentence cannot be set aside unless it can be shown that such irregularity has caused failure of justice. As will be presently seen we are of the opinion that non-compliance with the directions contained in Section 15 (2) in the matter of search would only be an irregularity and not such an illegality which will vitiate the trial. The decision in *Delhi Administration v. Ram Singh*, (1962) 2 SCR 694 = (AIR 1962 SC 63) which concerned offences committed under the Act and on which reliance has been placed on behalf of the appellant involved a different point. There the police officer who had entered the premises where the offences were alleged to be committed was not a special police officer who alone is authorised to do the various things mentioned in the provisions of the Act. It was observed that the Act created new offences and provided for the forum before which they would be tried. Necessary provisions of the Code of Criminal Procedure had been adopted fully or with modification. As the Act provided machinery to deal with the offences created, the necessary implication must be that the new

machinery was to deal with those offences in accordance with the provisions of the special Act. The entire police work in connection with the purposes of the Act within a certain area had been put in the charge of a special police officer. According to the majority judgment in that case, only the special police officer was competent to investigate and as the investigation had been conducted by a regular police officer who did not come within the category of a special police officer the order of the Magistrate quashing the charge-sheet was upheld. This case certainly supports one part of the submission of the counsel for the appellant that the Act is a complete Code with respect to what has to be done under it. In that sense it would be legitimate to say that a search which is to be conducted under the Act must comply with the provisions contained in Section 15, but it cannot be held that if a search is not carried out strictly in accordance with the provisions of that section the trial is rendered illegal. There is hardly any parallel between an officer conducting a search who has no authority under the law and a search having been made which does not strictly conform to the provisions of Section 15 of the Act. The principles which have been settled with regard to the effect of an irregular search made in exercise of the powers under Section 165 of the Code of Criminal Procedure would be fully applicable even to a case under the Act where the search has not been made in strict compliance with its provisions. It is significant that there is no provision in the Act according to which any search carried out in contravention of Section 15 would render the trial illegal. In the absence of such a provision we must apply the law which has been laid down with regard to searches made under the provisions of the Criminal Procedure Code.

6. Now in *State of Uttar Pradesh v. Bhagwati Kishore Joshi*, (1964) 3 SCR 71 = (AIR 1964 SC 221) this Court had to deal with a case where a booking clerk was stated to have committed an offence of criminal breach of trust. A Sub-Inspector of police made some investigation and submitted a report but this was done without obtaining the order of a Magistrate. Subsequently the permission of the Magistrate was obtained to investigate into the case as required by Section 5-A of the Prevention of Corruption Act. After making further investigation he

submitted a charge-sheet. The respondent in that case was tried and convicted under Section 5 (2) of that Act. It was held by this Court (by the majority) that there was a contravention of Section 5-A of the Prevention of Corruption Act at the first stage of investigation when the requisite permission of the Magistrate had not been obtained but after the permission had been given there was no de novo investigation. Therefore, the accused not having been prejudicially affected by the illegality committed by the police, the conviction could not be set aside on the ground of mere irregularity or illegality in the matter of investigation. The following passage at p 84 (of SCR) (at p. 226 of AIR) may be usefully reproduced:

"The High Court set aside the conviction on the ground that there was a breach of the mandatory safeguards of the Act in that the first stage of the investigation was contrary to the provisions of the Act. But it did not consider the other question whether the said breach caused prejudice to the accused in the matter of his trial. In doing so, the High Court ignored the provisions of Sec. 537 of the Code of Criminal Procedure. Having carefully gone through the record for the reasons aforesaid, we are satisfied that no such prejudice has been caused to the accused. He had a fair trial and had his full say."

It is abundantly clear that Section 537 of the Criminal Procedure Code would be applicable to the proceedings in the present case. Section 5 (2) of the Code provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code. All offences under any other law shall be similarly investigated etc, according to the same provisions but subject to any enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. According to Section 22 no Court inferior to that of a Magistrate as defined in clause (c) of Section 2 shall try any offence under Sections 3 to 8 of the Act.

7. Thus all proceedings including investigation had to be conducted in accordance with the procedure laid down in the Criminal Procedure Code except to the extent of the specific provisions contained in the Act. No such provision has been brought to our notice nor in-

deed has it been contended that Section 537 of the Code of Criminal Procedure would not govern the investigation, inquiry or trial of the offences with which the appellant was charged. The ratio of the decision in the case of Bhagwati Kishore Joshi, (1964) 3 SCR 71= (AIR 1964 SC 221) must be followed and in the absence of any prejudice having been shown by non-compliance with the provisions of sub-sections (1) and (2) of Section 15 of the Act, the order of the High Court must be upheld.

8. In conclusion it may be observed that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-sections (1) and (2) of Section 15 of the Act. The legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of delicate situations in respect of females. But the entire proceedings and the trial do not become illegal and vitiated owing to the non-observance of or non-compliance with the directions contained in the aforesaid provisions. The Court, however, has to be very careful and circumspect in weighing the evidence where there has been such a failure on the part of the investigating agency but unless and until some prejudice is shown to have been caused to the accused person or persons the conviction and the sentence cannot be set aside. It may not be out of place to reiterate what was said in *H. N. Rishbud and Inder Singh v State of Delhi*, (1955) 1 SCR 1150= (AIR 1955 SC 196), that a defect or an illegality in the investigation, however serious, has no direct bearing on the competency or the procedure relating to cognizance or trial of an offence and that whenever such a situation arises, Section 537 of the Code of Criminal Procedure is attracted and unless the irregularity or the illegality in the investigation or trial can be shown to have brought about a miscarriage of justice, the result is not affected.

9. For the above reasons this appeal fails and it is dismissed.

Appeal dismissed.

1970 CRI. L. J. 1283 (Vol. 76, C. N. 329)
(ALLAHABAD HIGH COURT)

S. N. KATJU, J.

State, Applicant v. Kamla Ram Nautiyal and others, Oppo. Parties.

Criminal Misc (Contempt) Case No. 50 of 1968, D/- 10-9-1968.

(A) Contempt of Courts Act (1952), S. 3 — Article in newspaper referring to pending case under S. 3 (7), Essential Commodities Act (1955) and S. 465, Penal Code (1860) — Article clearly stating that ration cards recovered from possession of accused were forged — Held, imputation amounted to contempt.

An accused person has to be presumed innocent until he is declared guilty by a Court of law. It is not open to anyone to pronounce the guilt of an accused person in advance. If that is done in any spoken or written comment it would clearly amount to interference in the course of justice and amount to prejudicing the mind of the Court against the accused. Where an article published in a newspaper referred to a case under S. 3 (7) of the Essential Commodities Act and under S. 465, Penal Code, which was pending in the Court of the Magistrate, and, it was clearly said in the article that the ration cards which had been recovered from the possession of the accused were forged, and a demand had also been made that he should be suspended and prosecuted, the imputation clearly amounted to contempt of Court. (Para 5)

(B) Contempt of Courts Act (1952), S. 3 — Publication of article, forming subject-matter of contempt of Court, in newspaper — Writer, editor and publisher are guilty. (Para 6)

(C) Contempt of Courts Act (1952), S. 3 — Objectionable reference to proceedings in newspaper — Proceedings not actually pending in a Court at time of publication — Contempt of Court is not committed. AIR 1953 All 600, Rel. on. (Para 4)

Cases Ref. : Chronological Paras
(1953) AIR 1953 All 600 (V 40)=1953

Cri L J 1337, Dwarka Prasad v.

Krishna Chandra

4

Govt. Advocate, for Applicant; K. C. Dhulyia, S. N. Doval, M. A. Ansari, and S. S. Bhatnagar, for Opp. Parties.

ORDER : — Notices were issued to Kamla Ram Nautiyal Advocate, Vidya Sagar Nautiyal, Maya Ram Ratauri, Udel, a communist M.L.A. of Banaras, Yogendra Sharma, editor, Janyug, New Delhi, Ramesh Sinha, Publisher, Janyug, New Delhi and Radha Krishna Kuk.

decision of Munsiff to prevent abuse of process of Court. (Paras 24 to 28) as and cannot be made use of by the respondent Magistrate.

Cases Referred : Chronological Paras

- (1961) AIR 1961 Pat 369 (V 48) =
1961 (2) Cri L J 371, Rameshwar
Bai v. Raghu Kabhar 14
- (1960) AIR 1960 J and K 66 (V 47) =
1960 Cri L J 532, Ram Lal v.
Chunilal 14
- (1959) AIR 1959 All 315 (V 46) =
1959 Cri L J 513 (FB), Raj Naram
v. State 21
- (1959) AIR 1959 Manipur 29 (V 46) =
1959 Cri L J 743, Thounaojam
Ningol Indrani Devi v. Gurumayum
Ningol Mannu Devi 14
- (1948) AIR 1948 All 105 (V 35) = 49
Cri L J 48, Chandra Ballabh v.
Emperor 13

Mool Behari Saxena, for Applicants; G. A.
Kesho Sahai, for Opposite Party.

SINHA, J. : — This is an application under
S. 561-A, Criminal P. C.

2. The facts leading to this application can
briefly be stated as under :

On the basis of a report submitted by
Station Officer, P. S. Dilari of district Morada-
bad proceedings under S. 147, Criminal P. C.
were instituted before the S. D. M. The learn-
ed S. D. M. found himself unable to arrive at a
definite conclusion as to which party had the
right of user over the land in dispute. There-
fore, by his order dated 1st November, 1968,
he made a reference to the Sessions Judge of
Moradabad for sending the file to a civil court
of competent jurisdiction for deciding as to
which party had the right to use the land.

3. Against this order, the present appli-
cants went up in revision before the Sessions
Judge of Moradabad. The Sessions Judge by
his order dated 7th January, 1969, rejected
the revision. The reference made to the Civil
Court has also since been disposed of by the
Munsif, Moradabad, through his finding dated
25th May, 1969. The Munsif sent back the
file to the Magistrate along with his finding
and directed the parties to appear before the
S. D. M. on 31st May, 1969.

4. On 13th August, 1969, the applicants
moved the present application in this Court
for the proceedings pending before the Magis-
trate being quashed under S. 561-A, Criminal
P. C.

5. The principal ground on which the prayer
for the proceedings being quashed is based is
that S. 146, Criminal P. C. is not applicable
to proceedings under S. 147, Criminal P. C.
and, consequently, not only the order of the
S. D. M. making reference to the Civil Court
was illegal but that the finding given by the
learned Magistrate is also inapplicable to the

6. According to S. 146 (1B), Criminal P. C. It was
after the finding of the Civil Court is final (that
by a Magistrate, he has no option but to con-
ceed to dispose of the proceedings in conformity with the decision of the Civil Court. Then the
The necessity of moving the present application had
arisen because the Magistrate had permis-
sion 5-A. He had
have no option except to pass an order conform-
ing with the finding of the Magistrate. There, the
Munsif.

7. The application first came up before police,
learned Single Judge of this Court. He took on
that though the grievance of the applicants, ille-
namely, that no reference under S. 147, Criminal
P. C. could be made to a civil court in proceedings under S. 147, Criminal
P. C. carried substance, there appeared to exist
an obstacle in the way of the applicants
in getting the reference order quashed. The
applicants had filed a revision before the
Sessions Judge assailing the order of the
S. D. M. making a reference to the civil court.
The revision was dismissed by the learned
Sessions Judge. The applicants did not come
up in revision before this court to assail the
orders passed by the Sessions Judge and that
of the S. D. M. It was, therefore, argued on
the one hand before the learned Single Judge
that the order of the Magistrate had become
final between the parties. On the other side,
it was argued that the order did not have the
effect of res judicata and that if the court is
convinced that the order of the Magistrate
making reference to the civil court is illegal,
it can act under S. 561-A, Criminal P. C.
to quash that order. The learned Single
Judge felt it constituted a question of law of
considerable importance and he, therefore,
directed that since the matter involved a ques-
tion of law of considerable importance, the
papers may be placed before the Hon'ble the
Chief Justice so that the matter may be
decided by a larger Bench. It is thus that it
has come before us

8. Three questions arise for consideration
in this case :

- (1) Whether S. 146, Criminal P. C. is
applicable to proceedings under
S. 147, Criminal P. C. ?
- (2) Whether because of the applicants
not having filed a revision against
the order of the Sessions Judge
dated 7th January, 1969, the order
of the Sessions Judge has become
final and resort cannot be had to
S. 561-A, Criminal P. C. to grant
any relief to the applicants ?
- (3) Whether this is a fit case in which
this Court should exercise its dis-

deed on a creation to grant relief to the application 53 was made under S. 561-A, Criminal P. C. In working up the first point, a perusal of inquiry Criminal P. C. would show that all the law permits is that in the matter of making the enquiry in the respective claims of the Kishores regarding the exercise of the impugned 1964 S. the Magistrate can resort to the provision of S. 145, Criminal P. C. so far as they have been applicable in the case of such enquiry. There is no reference of S. 146, Criminal P. C. Section 147, Criminal P. C. A reference High 145, Criminal P. C. would show that it also 8. There is no provision for a reference being made that the civil Court. It is in section 146, Criminal P. C. that the Magistrate making an enquiry into a dispute under S. 145, Criminal P. C. is given the option to refer the matter to the civil Court if he is not able to arrive at a conclusion himself. If the Legislature had intended that in proceedings under S. 147, Criminal P. C. also, it should remain open to the Magistrate to make a reference to the civil Court if he is not able to decide as to whether the claimants before him had the right to exercise the impugned right, reference of S. 146, Criminal P. C. could be explicitly made in S. 147, Criminal P. C. as well.

10: There are other reasons too which lend support to the conclusion that S. 146, Criminal P. C. has no correlation with S. 147, Criminal P. C. According to S. 146, Criminal P. C. reference can be made to the civil Court if the Magistrate is unable to decide as to which of the rival claimants was in possession of the immovable property. Again, when the reference is received by the civil Court, all that it can enquire into is as to which of the parties was in possession of the subject of dispute on the date of the preliminary order. A perusal of S. 147, Criminal P. C. would show that it does not relate to a dispute regarding possession of an immovable property. It relates to a dispute regarding exercise of a right. The exercise of a right is not always dependent on the possession of the property. A person may not be in physical possession of a property and yet he may have a right of some sort over that property, such as an easementary right. There is a specific mention of the easementary right in S. 147, Criminal P. C. The question that then arises, is if S. 146, Criminal P. C. is applicable to proceedings under S. 147, Criminal P. C. what shall be the terms of reference to be made by a Magistrate and what shall be the scope of an enquiry before the civil Court. Obviously, in view of the language contained in S. 147, Criminal P. C. the Magistrate seized of the proceedings under that section cannot make a reference to the Munsif to

make an enquiry on the point of possession of immovable property nor can the civil Court make an enquiry into that point for, such an enquiry is neither warranted by S. 147 nor can it be relevant to the point in issue in the proceedings under S. 147, Criminal P. C.

11. Again, a perusal of S. 145, Criminal P. C. would show that under that section, a Magistrate can call for the parties to file documents and to adduce, by putting in affidavits, the evidence of such persons as may be relied upon by them in support of the respective claims. The Magistrate acting under S. 145, Criminal P. C. has to act only on those documents and those affidavits. He can, in the alternative, call for and examine only such of the persons who may have filed affidavits. Persons other than those who have filed affidavits are not to be generally examined in proceedings under S. 145, Criminal P. C. The jurisdiction of a Magistrate under S. 147, Criminal P. C. is, however, wider as would appear on a perusal of sub-section (1A) of S. 147, Criminal P. C. Under that provision of law, the Magistrate can peruse the statements put in, can receive all such evidence as may be produced by the parties and can take such further evidence as he may consider necessary. In other words, in proceedings under S. 147, Criminal P. C. it is open to the claimants to adduce oral evidence before the Magistrate by examining the witnesses, and, it is open to the Magistrate to take such further evidence as he may consider necessary. Obviously, this wider jurisdiction has been conferred on a Magistrate under S. 147, Criminal P. C. because in proceedings under the said section, he does not have the advantage to refer the matter to a civil Court for adjudication.

12. There is yet another reason in support of the view that S. 146, Cr. P. C., is not applicable to the proceedings under S. 147, Cr. P. C. In sub-s. (1E) of S. 146, Cr. P. C., it is said that an order under this section shall be subject to any subsequent decision of a Court of competent jurisdiction. No analogous provision is contained in S. 145, Cr. P. C. In S. 147 (4), Cr. P. C., however, an express provision has been incorporated to say that an order passed by a Magistrate under that section shall be subject to a subsequent decision of a civil court of competent jurisdiction. If S. 146, Cr. P. C., was applicable to proceedings under S. 147, Cr. P. C., it was not necessary to incorporate sub-s. (4) in S. 147, Cr. P. C.

13. Therefore, on a bare perusal of Ss 145, 146 and 147, Cr. P. C., we are of the opinion that S. 146, Cr. P. C., does not apply to proceedings under S. 147, Cr. P. C. Learned

counsel for the opposite party has not been able to produce before us a single decision in which a contrary view may have been expressed. On the contrary, learned counsel for the applicants has referred us to the case *Chandra Ballabh v. Emperor*, A I R 1948 All 105. It was observed in this case :

"I am inclined to accept his view that the way S. 146 is worded it is probably not applicable to a dispute relating to a right of user of immovable property, but I do not see why the learned Magistrate could not pass a suitable order under sub-s (3) of S. 147."

14. Reference has also been made on behalf of the applicants to the case *Ram Lal v. Chuni Lal*, AIR 1960 J & K 66, to the case *Thounajam Ningol Indrani Devi v. Gurumayum Ningol Mainu Devi*, A I R 1959 Manipur 29 as also to the case *Rameshwar Rai v. Raghu Kabhar*, AIR 1961 Pat 363. In all the three cases, it has been observed that S. 146, Cr. P. C., does not relate to proceedings under S. 147, Cr. P. C.

15. Much stress was laid on behalf of the opposite party on the words "if possible" occurring in sub-s. (1A) of S. 147, Cr. P. C., Learned counsel for the opposite parties contended that these words indicate that in cases in which it is not possible for a Magistrate to come to a conclusion himself, he can refer the matter to the Civil Court. It was contended by the learned counsel that proceedings under S. 147, Cr. P. C., are initiated when there is an apprehension of breach of peace and, consequently, the matter cannot be left at that stage by the Magistrate but that he has to give a decision.

16. Having given our careful thought to this contention, we do not find much force in it. There can be three different situations in proceedings under S. 147, Cr. P. C., namely—

- (1) where the Magistrate, on enquiry comes to the conclusion that the applicant before him is entitled to exercise the impugned right,
- (2) where the Magistrate finds that no such right, as claimed, exists, and,
- (3) where the Magistrate is not able to conclude as to whether any right as claimed by the applicant does or does not exist.

17. In the first situation, the Magistrate will act under sub-s. (2) of S. 147, Cr. P. C., and there can be no difficulty about it. In the second situation, the Magistrate can pass an order under sub-s. (3) of S. 147, Cr. P. C. In the third situation, all that the Magistrate has to do is to dismiss the application on the ground that the applicants are not able to substantiate that they are entitled to exercise the impugned right. If the Magistrate feels that any apprehension of breach of peace is likely, he can have resort to the proceedings

under S. 107, Cr. P. C. Therefore merely for the reason that the words "if possible" occurred in S. 147 (1A), Cr. P. C., we cannot load ourselves to the conclusion that S. 147, Cr. P. C., is applicable to proceedings under S. 147, Cr. P. C.

18. Our answer on the first point is that S. 146, Cr. P. C., is not applicable to proceedings under S. 147, Cr. P. C.

19. This takes us to the second point raised earlier in this judgment. The contention that has been raised on behalf of the opposite party is that the applicants' revision application in the Court of Sessions Judge assailing the order of the Magistrate making a reference to the civil Court was dismissed by the Sessions Judge, and, thereafter, the applicants did not file any revision in this Court with the result that the order of the Sessions Judge has become final and it is no more open to the applicants to invoke the aid of S. 561-A, Cr. P. C., for getting the proceedings before the Magistrate quashed.

20. The simple point which is, therefore, to be considered in this connection is whether finality attaches to the order passed by the Sessions Judge in exercise of his revisional jurisdiction. For this reference is necessary to S. 480, Cr. P. C., which reads as follows—

"480 Judgments and orders passed by an Appellate Court upon appeal shall be final except in the cases provided for in S. 417 and Chapter XXXII."

21. Provisions relating to reference and revisions are contained in Chapter XXXII, Criminal P. C. S. 480, Criminal P. C. therefore, leads to this that no finality attaches to orders passed in revisional jurisdiction. There are a number of decisions on this point, but it would suffice to make a reference to the case *Raj Narain v. State*, AIR 1959 All 815 (FB). Almost the entire law has been examined in this case and the Full bench held that finality does not attach to orders passed in revision and that this Court has power to revoke, review, recall or alter its decision passed in a criminal revision and can re-hear the same.

22. In view of the above, we have no difficulty in concluding that the decision of the Sessions Judge in the instant case does not prevent the applicant from invoking the aid of S. 561-A, Criminal P. C. nor does it prevent us to exercise our discretion under the said provision of law.

23. The last point for consideration is whether this is a fit case in which jurisdiction should be exercised under S. 561-A, Criminal P. C. to grant any relief to the present applicants. Section 561-A, Criminal P. C. reads as follows:

"561-A. Nothing in this Code, shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

24. A perusal of the above would show that jurisdiction can be exercised under S. 561-A, Criminal P. C. in either of the following three situations.

(1) When it is necessary to give effect to any order under this Code.

(2) When it is necessary to prevent abuse of the process of any Court.

(3) When it is otherwise necessary to secure the ends of justice.

25. We have already concluded earlier that S. 146, Criminal P. C. is not applicable to proceedings under S. 147, Criminal P. C. It would mean that the reference made by the S. D. M. to the civil court and the decision of the Civil court on that reference are without jurisdiction. If no relief is granted to the applicants in the present proceedings, it will lead to this that the Magistrate shall have to pass an order in conformity with the decision of the civil court which shall again be an illegality. Therefore, if in the instant case, we exercise jurisdiction under S. 561-A, Criminal P. C. we shall be doing so in order to give effect to the provisions contained in the Criminal Procedure Code and to prevent abuse of the process of the Court.

26. Learned Counsel for the opposite parties contended before us that S. 561-A, Criminal P. C. confers extraordinary jurisdiction on this Court and it should not be resorted to if the party coming before this Court has any other remedy available to it. Even accepting this contention, we find that no remedy under the ordinary law is available to the applicants to prevent the Magistrate from passing the final order in proceedings under S. 147, Criminal P. C. which, in the absence of any intervention by us, will be in conformity with the decision of the civil court. It may be possible for the applicants to file a civil suit for adjudication of rights with regard to the right of user but no such suit can be filed to prevent the Magistrate from passing the order. We do not, therefore, think that any remedy is open to the applicants to prevent the Magistrate from passing the order.

27. Once it has come to our notice in the present proceedings that if we do not interfere, an illegal order is likely to be passed by the Magistrate who is seized of the proceedings under S. 147, Criminal P. C., we think it desirable that we should interfere.

28. In the above view of the matter, the present application is allowed. The order of the S. D. M. dated 1st November, 1968, by which he referred the matter to the civil court, and the finding of the Munsif dated 31st May, 1969, are quashed. It will be open to the Magistrate to proceed in accordance with law, as contained in Section 147, Criminal P. C. and in the light of the observations contained in the body of the judgment.

Application allowed.

1970 CRI. L. J. 1289 (Vol. 76, C. N. 331)

(ALLAHABAD HIGH COURT)

V G. OAK, C. J.

Asgar, Applicant v. State, Opposite Party.

Criminal Revn. No. 1891 of 1967, D/- 1-1-1969, against judgment of 1st. Temp Civil and S. J., Bulandshahr, D/- 16-10-1967.

Prevention of Food Adulteration Act (1954), Ss. 7 and 16—Compulsory sale to Food Inspector—Sale does not bring the accused within clutches of Ss. 7 and 16.

Compulsory sale of an article of food to Food Inspector would not constitute a sale for purposes of Ss. 7 and 16 of the Prevention of Food Adulteration Act, and such a sale, in the absence of proof that food was meant for sale, would not bring the accused under Ss. 7 and 16 of the Act. Under S. 10 (1) (a) (ii) the Food Inspector is entitled to collect a sample from a person even if he is carrying it not for sale but for his own use. Section 10 (3) directs the Inspector to pay the price of the article to its owner. A purchase made under such circumstances cannot be considered a voluntary sale. (Paras 6 and 7)

M. K. Saraswat, for Applicant. G. A., for Opposite Party.

ORDER.—This criminal revision arises out of a prosecution under the Prevention of Food Adulteration Act. According to the prosecution, Asgar accused was carrying two drums containing adulterated milk. He was stopped by R. D. Sharma, Food Inspector. He purchased samples of milk, which the accused was carrying. One sample was sent to the Public Analyst. It was reported that the sample was deficient in non-fatty solids. The accused was, therefore, prosecuted under S. 7/16, Prevention of Food Adulteration Act, for selling adulterated milk. The accused conceded that he was checked by the Inspector. But it was denied that any money was paid to the accused. The trial Court was satisfied that the accused was selling adulterated milk. He was, therefore, convicted under

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S. 16, Prevention of Food Adulteration Act, and was sentenced to rigorous imprisonment for 12 months and a fine of Rs. 1,000. Asgar's appeal was dismissed by the Temporary Sessions Judge, Bolandshahr. Asgar has, therefore, come to this Court in revision.

2. It is common ground that R. D. Sharma, Food Inspector took a sample of milk from the accused. The main question for consideration is whether the milk, which the accused was carrying, was meant for sale. Three witnesses were examined for the prosecution. P. W. 1 is R. D. Sharma, Food Inspector. He stated that the accused carried some 15 seers of milk. He denied the suggestion that the accused carried only four seers of milk.

3. P. W. 2 supported the Food Inspector in the examination-in-chief. But in cross-examination P. W. 2 stated that the accused had five seers of milk in a Dikka. The accused was saying that the milk was not for sale. He was taking it to a relation of his. Abdul Rashid (P. W. 3) turned hostile. It will be noticed that two out of the three witnesses for the prosecution turned hostile.

4. Shaukat (D. W. 1) stated that the accused is his nephew. The accused brought milk for the witness.

5. There is material difference between the statements of the Food Inspector and P. W. 2 as regards the quantity of milk. The position taken up by the accused was that the milk was not for sale. He was taking it to a relation of his. The statement of the accused on this point is supported by the statements of P. W. 2 and D. W. 1. It is therefore, quite possible that the milk, which the accused was carrying was not meant for sale at all.

6. The learned Magistrate discussed this question thus:—

"The only question is whether it was for sale or not. He had definitely sold the milk to the Food Inspector which is a sufficient evidence for sale."

Now, I do not think that compulsory sale would constitute sale for purposes of S. 7 of the Act. Section 10 of the Act confers wide powers on Food Inspectors to collect samples of suspected articles. Sub-section (1) of S. 10 states,—

"A Food Inspector shall have power—

(a) to take the samples of any articles of food from—

(i)

(ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee....."

It appears that on the language of sub-cl. (ii) of cl. (a) of sub-s. (1) of S. 10 of the Act the Food Inspector would have been entitled to collect a sample from Asgar even

if Asgar's milk was not meant for sale. Sub-section (3) of S. 10 directs the Food Inspector to pay the price of the article to its owner. A purchase made under such circumstances cannot be considered a voluntary sale. Since the milk was not in fact meant for sale, and of this nature would not bring the accused within the clutches of Ss. 7 and 16 of the Act.

7. The prosecution evidence on the question whether the milk was for sale is meagre. There is reasonable possibility that the milk, which the applicant was carrying, was not meant for sale. Under the circumstances, the applicant's conviction under S. 16 of the Act appears to be improper.

8. The revision is allowed. I acquit Asgar of the charge under S. 16, Prevention of Food Adulteration Act. His bail bonds are discharged. If any fine has already been paid, it shall be refunded.

Petition allowed.

1970 CRI. L. J. 1290 (Vol. 76, C. N 332)

(ANDHRA PRADESH HIGH COURT)

MADHAVA REDDY, J.

Sattenapalli Goparaju, Petitioner v. Meka Ramakrishna and another, Respondents.

Criminal Revn. Case No. 363 of 1968 and Case Referred No. 46 of 1968, D/- 29.7.1969, against order of Addl. S. J., West Godavari at Eluru, D/- 3.5.1968.

Criminal P. C. (1898), S. 182—Place of trial—Determination—Misappropriation or breach of trust case.

For trying offences under S. 405 or 403, Penal Code the place of receipt or retention by the accused of the incriminating property determines the Court's jurisdiction in view of S. 182, Criminal P. C. (Para 6)

As such, where an accused, a clerk employed in a shop at Eluru, goes to Vijayawada and purchases there some goods for the shop, fails to deliver or account for it at Eluru the business place, and the place of conversion is not clear, the Vijayawada Court will undoubtedly have the jurisdiction to try the case. He will also be deemed to have committed criminal breach of trust at Eluru. In view of the doubtfulness of the place of conversion, Eluru Court also will have jurisdiction. AIR 1952 Mad 158 & AIR 1937 Bom 371 and AIR 1957 S C 196, Foll. (Paras 6 and 7)

Cases Referred: Chronological: Paras (1957) AIR 1957 S C 196 (V 44)=

1957 Cri L J 322, M. P. State v.

K. P. Ghara

- (1952) AIR 1952 Mad 158 (V 39) =
1952 Cri L J 308, Arunachala v.
Akhileshwara 6
(1937) AIR 1937 Bom 371 (V 24) = 38
Cri L J 977, Anthoni D' Mello v.
J. M. Pereira 6
Public Prosecutor, for State.

ORDER: This is a reference made under S. 438, Criminal P. C. by the Additional Sessions Judge, West Godavari Division, Eluru, to set aside the order of the 1st Addl. Judicial First Class Magistrate, Eluru returning the complaint under S. 201 (1), Criminal P. C. for presentation to the proper Court.

2. The complaint with the following material allegations was filed before the Magistrate.

3. The complainant is a resident of Eluru and Proprietor of a cloth shop carrying on business of cloth while the accused is a clerk employed by him and entrusted with the care of various articles in the shop like sarees, shirting and other cloth. He is also entrusted with the duties of maintaining the accounts and conducting sales in the shop. The accused, on the pretext of seeing some of his relatives at Vijayawada, who were bereaved, left the shop of the complainant. He went to Vijayawada, purchased cloth worth Rs. 1,542.53 Ps. on 12.7.1966 from certain merchants at Vijayawada on behalf of the complainant. He took delivery of part of the said stock and the remaining, he caused to be sent to Eluru along with 5 bills. The said stock was however, returned to the complainant to the various owners from whom the accused had purchased. Out of the 5 bills made out in the name of the complainant, it was stated in the complaint that the stock pertaining to Bill No. 5328 from Potti Tandava Sreekrishnarao & M. Narayana Rao and Bill No. 7984 from Sri Krishna & Co., which were separately packed and entrusted to this accused, were taken in person by the accused to be delivered to the complainant.....The accused has not given delivery of the stocks to the complainant.

As a result of this Act of the accused, the complainant had incurred a loss of Rs. 363.74 Ps. which was dishonestly and wrongfully caused by the accused. The accused admitted that he has brought the above two bundles with him and promised to return them to the complainant or to make good the value thereof to the complainant, but has been adopting various dilatory tactics and till now he has not returned any of themThe accused requested the complainant personally not to take any drastic action for the misappropriation of this stock he brought from Vijayawada and promised to make good the value of the two parcels brought from Potti Tandava Sree-

krishna Rao & M. Narayana Rao and Sri Krishna & Co, Vijayawada "

4. The learned Magistrate framed a charge for an offence under S. 420, I. P. C., to which the accused pleaded not guilty. After recording the entire evidence, he came to the conclusion that the offence under S. 420, I. P. C., was not made out against the accused but instead an offence under S. 406, I. P. C. was proved beyond doubt. He held that though a specific charge under S. 406, I. P. C. was not framed, the accused could be convicted for the said charge. But he was of the opinion that, as there was no specific evidence with regard to the accused bringing the stock to Eluru and converting the same to his own use within the jurisdiction of that Court, the Court at Eluru had no jurisdiction to entertain the case and accordingly directed the return of the complaint under S. 201 (1), Criminal P. C. for presentation to the proper Court.

5. The learned Sessions Judge, West Godavari being of the opinion that this order is bad in law, has made this reference.

6. From the material averments which have been extracted above, it is clear that the accused after having been entrusted with the stock of cloth at Vijayawada is not alleged to have converted the said stock to his own use at Vijayawada. In fact it is not specifically mentioned as to where exactly the stock of cloth was converted by him to his use. On the contrary, it is stated in the complaint that the accused admitted his having brought the two bundles of cloth with him and promised to return the same to the complainant or make good its value. This evidently means that the accused brought the cloth from Vijayawada to Eluru. In para. 14 of the complaint it is also stated that the accused requested the complainant personally, "not to take any drastic action for the misappropriation of the stock he brought from Vijayawada." This also indicates that he brought the stock from Vijayawada and if at all, the conversion has taken place at Eluru.

In any event, the least that could be said is that it is not clear as to where exactly the cloth was converted to his own use by the accused after he was entrusted with the said stock at Vijayawada. For trying an offence of criminal misappropriation or criminal breach of trust, the place where the property which is the subject of the offence was received or retained by the accused person or the offence was committed, determines the jurisdiction of the Court as laid down in S. 182, Criminal P. C. Section 182 reads as follows -

"When it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local

area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

In view of the above the Vijayawada Court would undoubtedly have jurisdiction. But at the same time, if the stock was retained by the accused at Eluru or the stock was converted by committing criminal breach of trust or misappropriation within the jurisdiction of Eluru Court, that Court would have jurisdiction. In fact the offence alleged against the accused is one of criminal breach of trust resulting from not accounting for the stock of cloth entrusted to him and not converting the same for his own use. The place of the business of the complainant where the accused was to deliver the stock or to render account is Eluru, the Court below in which the complaint was filed. That Court will, therefore, have jurisdiction to entertain the complaint.

A somewhat similar question came up for consideration in *Arunachala v. Akhileshwara*, AIR 1952 Mad 158 wherein Ramaswami J., held, "where the charge is of non accounting and there is no specific allegation of misappropriation in any particular place the venue of the trial will be the place where the accounting has got to be done and has not been done." In *Anthony D'Mello v. J. M. Pereira*, AIR 1937 Bom 371, where the accused who was a travelling agent of the complainant was entrusted with some ornaments for sale while he was on tour, sold the articles at Karachi and returned to Bombay, the place of business of his master and failed to produce the money for the goods sold by him, it was held that when it is not clear whether the money received for the goods sold was actually misappropriated in Bombay or at any place outside Bombay, the Bombay Court could not discharge the accused simply on the ground of want of jurisdiction, unless it was established that the actual misappropriation took place elsewhere. The Supreme Court in *Madhya Pradesh State v. K. P. Ghara*, AIR 1957 S C 196 had to consider the question of the venue of trial in a case of embezzlement. Govinda Menon, J. speaking for the Bench laid down the principle in the following words:

"The venue of enquiry or trial of a case like the present is primarily to be determined by the averments contained in the complaint or charge-sheet and unless the facts there are positively disproved, ordinarily the Court where the charge-sheet or complaint is filed, has to proceed with it, except where action has to be taken under S 202, Criminal P. C."

7. In view of the averments of the complaint in this case, while the stock of cloth was entrusted to the accused in Vijayawada, the same was brought by the accused from that place and while the accused was liable to account for the said stock or deliver it to the complainant at Eluru, he failed to do so. Where exactly it was converted is not clear. The place of business of the complainant being Eluru the accused was bound to render account to the complainant at Eluru and having failed to do so, he would be deemed to have committed criminal breach of trust at Eluru. In view of the facts and circumstances of this case, this determines the jurisdiction of the Court.

In any event, in view of the above averments in the charge-sheet at the worst it would be a case wherein it is doubtful where exactly the conversion took place. In either view of the matter the Court at Eluru would have jurisdiction to entertain the complaint, to proceed with the enquiry and convict the accused. The reference is accordingly accepted and the revision is allowed and the order directing the return of the complaint set aside. The accused is not present although notice is affixed to the last residence of the accused.

Reference accepted.

1970 CRI. L. J. 1292 (Vol. 76, C. N. 333)
(ASSAM AND NAGALAND HIGH COURT)

S. K. DUTTA C. J.

Narayan Chandra Das, Petitioner v. Sugar Chand Sarawgi and another, Opposite Parties.

Criminal Revn. No. 96 of 1966, D/- 6-6-1969 against Order of Addl. S. J. L. A. D., Gauhati in Cri. Motion No 46 (K 3) of 1966.

Criminal P. C. (1898), Ss. 133 and 139-A—Procedure—Person served with order under S. 133 denying existence of public right—Enquiry under S. 139-A—Reliable evidence in support of denial not produced—Only further enquiry that can be made is whether obstruction relates to public path or not. (Para 4)

D. O. Goswami, for Petitioner, K. Lahiri, G. Bhattacharyya and D. P. Sen, for Opposite Parties.

ORDER.—This revision petition arises out of a proceeding under S. 133, Criminal P. C. The proceeding under the said section was drawn up on the basis of a police report. It was alleged that the second party had obstructed a public path which was used by the first party.

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2. The scheme of inquiry in a proceeding under S. 133, Criminal P. C., is as follows :

3. When a person is served with an order under S. 133, Criminal P. C.

The Magistrate shall ask him whether he J. M. : existence of the public right in Public In case of denial the Magistrate ORDER not an inquiry into the matter under S. 438, C. before holding any inquiry under S. 138, Criminal P. C. At this to set aside the person shall have to produce re- First Evidence in support of his denial of a complaint.

for present the Magistrate finds that there is reliable evidence in support of the denial, his jurisdiction ceases and the proceeding shall be stayed until the matter is decided by Civil Court.

All that the Magistrate has to see is if there is some "reliable evidence" which tends prima facie to support the existence of a private right. Reliable evidence does not mean evidence which definitely establishes the right claimed.

(iii) If the person does not raise any question of private right or if there is no reliable evidence in support of such a right, the Magistrate shall hold an inquiry under S. 137 or S. 138.

(iv) If the person fails to deny a public right or having denied the same, fails to adduce reliable evidence in support of the denial, then in the inquiry under S. 137 or S. 138, which follows, he will not be allowed to deny the public right. Nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under S. 138. The only thing left will be to inquire whether the obstruction relates to the public path or not.

4. In the present case, it appears that the learned Magistrate was under some misapprehension. He gave a finding that there was no reliable evidence to support the denial of a public right and yet he again went to take evidence in support of the denial. This he could not do. If in the enquiry under S. 139-A reliable evidence is found in support of the public right, then the jurisdiction of the Magistrate is ousted. If no reliable evidence is found, then the only enquiry that can be made under S. 137, Criminal P. C., is whether the obstruction relates to the public path or not. All the evidence that can be adduced in support of the denial should be adduced at the proceeding under S. 139-A. But the Magistrate took evidence after giving a finding that there was no reliable evidence to support the denial.

5. In this view of the matter, the case goes back to the Court below where it should be

disposed of according to the procedure laid down above.

Order accordingly.

1970 CRI. L. J. 1293 (Vol. 76, C. N. 334)
(ASSAM & NAGALAND HIGH COURT)

P. K. GOSWAMI C. J.

Sashindra Laskar, Petitioner v. Akaddas Ali,
Opposite Party.

Criminal Revn. No. 158 of 1968, D/- 12.3.1970, against Order of S. J., Cachar at Silchar D/- 27.6.1968.

Criminal P. C. (1898), S. 439 — Revisional jurisdiction of High Court — Public servant refusing to lodge complaint under S. 195 (1) (a) — Order is administrative — Not revisable by High Court — AIR 1936 Patna 74 & AIR 1938 Peshawar 9 & AIR 1942 Cal 307, Referred. (Para 3)

Cases Ref.: Chronological Paras
(1942) AIR 1942 Cal 307 (V 29) = 43

Cri L J 636, Emperor v. Ramjanam Singh 4

(1938) AIR 1938 Peshawar 9 (V 25) =

39 Cri L J 445, Dane Shah Suthra v. D. Gurdittamal 4

(1936) AIR 1936 Pat 74 (V 23) = 37

Cri L J 104, Thakur Prasad v. Emperor 4

A. R. Barthakur and B. P. Saikia, for Petitioner, M. H. Choudhury and M. S. Rahman, for Opposite Party.

ORDER.—This application purported to be in revision is directed against an order passed by the Sadar Sub-Divisional Magistrate, First Class, Silchar, on an application made to him for lodging a complaint under S. 138, Indian Penal Code to a proper Court.

2. The facts were something like these. There was apparently a proceeding under S. 145, Criminal P. C., in which certain land was attached. During the pendency of attachment, there was a complaint that the opposite party trespassed into the land which has given rise to the petition before the learned Sub-Divisional Magistrate for taking action for disobedience of the order of attachment. This petition was sent to the police for report which was in favour of the petitioner's allegations. The learned Sub-Divisional Magistrate finally passed the following brief order.

"Party may take step as they deem fit.

K Bora.

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The petitioner took the matter up to the learned Sessions Judge who also refused to

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interfere with the order holding "... I do not think there is even a ghost of a chance of success if a prosecution is launched."

3. This was an application under Section 195 (1) (a) of the Code of Criminal Procedure to the Sub-Divisional Magistrate, before whom the Criminal Proceeding under S. 145 was pending. Section 195 (1) (a) reads as follows:

"195. (1) No Court shall take cognizance—

(a) of any offence punishable under Ss. 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate."

When the prayer was made to the Sub-Divisional Magistrate under S. 195 (1) (a) for lodging a complaint under S. 188, Indian Penal Code, it was not an application to a Court as is commonly understood. It was an application to a public servant and if the public servant chooses not to complain that cannot be a judicial order attracting the revisional jurisdiction of this Court or even its superintendence under Art. 227 of the Constitution. The provisions of S. 195 (1) (a) is only to be contrasted with what follows under the provisions of S. 195 (1) (a), where it is clearly laid down that certain offences which are alleged to have been committed in, or in relation to, any proceeding in any Court, no prosecution shall take place except on the complaint in writing of such Court or some other Court to which such Court is subordinate. The expression 'Court' is inserted in clear contrast with the words 'public servant' in S. 195 (1) (a). The impugned order, which is the original order of the Sub-Divisional Magistrate, is clearly an administrative order within the purview of S. 195 (1) (a).

4. Mr. Choudhury, who opposes this petition, draws my attention to a decision of the Patna High Court, AIR 1986 Pat 74, Thakur Prasad v. Emporor, a decision of the Poshwar Judicial Commissioner's Court, 99 Cri L J 445=(A I R 1988 Peshawar 9) and lastly a Division Bench decision of the Calcutta High Court in 48 Cri L J 636=(AIR 1942 Cal 307), Emperor v. Ramjanam Singh, where the view which I am taking in this case has received support.

5. In the result, the application has no merit and is accordingly dismissed.

Petition dismissed.

1970 ORI. L. J. 1294 (Vol. 76, C. N. 335)

(BOMBAY HIGH COURT AT NAGPUR)

BHOLE, J.

State of Maharashtra, Petitioner v. Natthuji Rajurkar and others, Opponent
Criminal Reference No. 48 of 1967
1970.

(A) Criminal P. C. (1893), S. 145 (as substituted by Act 26 of 1950) — Failure to peruse affidavits of the parties and his witnesses violated the order.

(B) Criminal P. C. (1898), S. 145 (as substituted by Act 26 of 1950) — Proceedings under — Rules of evidence

Whenever, any statements, affidavits or documents are brought on record and whenever a party wants them to be considered as evidence, the party will have to bring evidence on record according to the rules of evidence under the Evidence Act ILR 1963 Madh Pra 360, Rel. on. (Para 6)

Cases Referred : Chronological Paras
(1963) I L R 1963 Madh Pra 360 =
1963 Jab L J 422, State of M. P. v. Swami Prasad 6

C. S. Dharmadhikari, Asst. Govt. Pleader, for State; N. K. Kherdekar, for Opponents Nos. 1 and 2, R. N. and R. R. Deshpande, for Opponent No. 3.

ORDER : — This is a reference by the Additional District Magistrate, Akola, recommending that the order of the Sub-Divisional Magistrate in S. 145, Criminal P. C. Proceedings is vitiated by non-consideration of the affidavit evidence and that he misdirected himself to come to a conclusion on the basis of evidence not legally tendered.

2. There was a dispute between the two parties in village Risod, district Akola. The subject matter of the dispute was a Pardi land adjoining this village admeasuring 1 acre 19 gunthas with a well. Irrigation crops were grown on this land. This land is owned by one Vithalrao Deshmukh. It was leased out to one Nathuji who was in possession till 18-8-1967 when he died. He left his wife Kalabai and his son Rambhau as his successors. They were in possession after the death of Nathuji. A quarrel was started by one Sambhaji who is Party No. 2 by claiming possession of this Pardi land. His claim is that he was in possession from a date prior to 1967-68 as a lessee of the owner Vithalrao Deshmukh

and that his possession has been an exclusive and a peaceful possession.

3. Because of the apprehension of breach of peace, the matter went up to the Sub-Divisional J. M. Magistrate. The proceedings were started under Section 145, Criminal P. C. A preliminary order was passed on 15-7-1968. Affidavits were filed by both the parties.

4. The learned Sub-Divisional Magistrate considered the documents filed by Party No. 2 to set aside the order but did not consider either the First Affidavits filed by Rambhau or Kalabai or the affidavits of their witnesses. It appears that he has also not

5. On the other hand, he considered the affidavits of Party No. 2 Sambhaji as well as his witnesses and came to the conclusion that Sambhaji Party No. 2 was in possession of this Pardi land for the last two years before the order. The matter, therefore, went up before the Additional District Magistrate in revision and it was heard by Mr. V. M. Indurkar, Additional District Magistrate, Akola.

6. The learned Additional District Magistrate after considering the arguments and the record came to the conclusion that the order passed by the Sub-Divisional Magistrate was vitiated because the learned Magistrate did not consider the affidavit evidence of Party No. 1 or the affidavit evidence of their witnesses. The learned Additional District Magistrate was also of the view that some inadmissible evidence, viz. the police statements of Party No. 1 were also admitted in evidence. But from the record it appears that that evidence was not admitted in evidence by the Sub-Divisional Magistrate. He has discarded those statements probably because they were not proved properly. The learned Additional Magistrate was also of the view that the possession even if there was one of Sambhaji was not legal because Nathuji was a protected lessee and Sambhaji could not come into possession without any valid surrender by the protected lessee. Accordingly, therefore, the learned Additional District Magistrate has referred the matter here to quash the order passed by the Sub-Divisional Magistrate. The learned Sub-Divisional Magistrate, of course, is concerned only with the fact of possession.

7. The learned advocate for Party No. 1 has argued that the Party No. 1 did file affidavits of Rambhau, Kalabai and Tatyrao (a neighbour on the adjoining field) and one Sakharam (who was a vegetable vendor who was purchasing vegetables from the disputed fields). The learned advocate therefore says that because that evidence was not considered, therefore, the order passed by the learned Sub-Divisional Magistrate is vitiated. On the

other hand, the learned Advocate for Party No. 2 contends here that the Sub-Divisional Magistrate must have considered not only the affidavits of Party No. 1 but also the affidavits of their witnesses and then only come to the conclusion that Party No. 2 was in possession. According to him, we should not be too technical and try to notice in the order as to how the learned Sub-Divisional Magistrate has referred or assessed the affidavits of Party No. 1. I cannot accept this contention because the order clearly shows that he neither perused nor discussed the affidavits of Party No. 1 and his witnesses. It is the duty of the Magistrate not only to peruse all the evidence led by both party but also assess its value by proper application of mind and then come to a finding as regards the possession. The order shows to the contrary. Therefore his order is vitiated. I am, therefore, inclined to agree with the learned advocate for the Party No. 1 that the matter should go back to the trial Court for inquiry according to law.

8. In so far as statements of Kalabai and Rambhau (Party No. 1) before the police are concerned, these statements appear to have been merely produced without examining the police officer who had recorded these statements and putting them to the Party No. 1 by calling them as witnesses in the witness-box. The learned advocate for Party No. 2, however, contends here that under S. 145 (4), Criminal P. C. it is not necessary to observe any rule of evidence for the purpose of bringing on record the statements and documents. According to him, without observing any rules of evidence under the Indian Evidence Act, such statements as police statements which were recorded before, could be admitted in evidence. According to him, this evidence also should be considered by the trial Court. It is, however, difficult for me to agree with the learned advocate for the Party No. 2. There is nothing in S. 145 (4) to show that the Magistrate ought to peruse the statements, documents and affidavits without observing any rules of evidence. The learned advocate invites my attention to the old S. 145 (4) of the Criminal Procedure Code and says that the new S. 145 (4) which was substituted by Act No. 26 of 1955 shows that the Magistrate need not follow any rules of evidence for the purpose of perusing the statements, documents and affidavits to come to a finding regarding the possession of the subject-matter of the enquiry. I cannot accept this contention for the obvious reason that neither there was any provision in the previous S. 145 (4) that rules of evidence should not be followed nor there is any provision in the substituted provision of S. 145 (4) to show that the rules of evidence should not

be followed. Whenever therefore any statements, affidavits or documents are brought on record and whenever a party wants them to be considered as evidence, the party will have to bring that evidence on record according to the rules of evidence under the Indian Evidence Act. I am reinforced in my view by the view of the Madhya Pradesh High Court in State of M. P. v. Swami Prasad, ILR 1968 Madh-Pra 360. That High Court also was of the view that the amendment introduced in S. 145, Criminal P. C. does not abrogate the law of evidence except that after the amendment affidavits filed have to be read as evidence. According to the M. P. High Court, it would be preposterous to think that the documents tendered by a party with his written statement become entitled to be acted upon without being required to be proved in the absence of anything being said in S. 145, Criminal P. C. suggesting this conclusion. I cannot, therefore, accept the contention of the learned advocate for Party No. 2 that the documents viz. the statements of Party No. 1 recorded by the police can be considered without his observing the rules of evidence to bring them on record. If he chooses to bring them on record, he may be allowed to do so according to the rules of evidence.

In the above view of the matter, therefore, the order passed by the learned Sub-Divisional Magistrate is illegal and improper. I, therefore, accept the reference of the learned Additional District Magistrate, set aside the order of the learned Sub-Divisional Magistrate and send back the record and proceedings to him for inquiry according to law and to find out the possession of the parties concerned.

Reference accepted.

1970 CRI. L. J. 1296 (Vol. 76, C N. 336)
(BOMBAY HIGH COURT)

WAGLE, J.

Parshuram Ramchandra Mohite and others,
Petitioners v. State, Respondent.

Criminal Revn Appls. Nos. 249 and 306
of 1969, D/- 18.7.1969.

Essential Commodities Act (1955), S. 7
(i), (a) (ii) — Penalties — Maharashtra
Scheduled Foodgrains (Stocks Declaration
and Procurement and Disposal, Acquisition,
Transport and Price Control) Order (1966),
Cl. 12 — Prosecution of accused under
S. 7 (i) (a) (ii) read with Cl. 12 of the
Order — Accused found to be transporting
rice from Belgaum to

place within Ratnagiri District — Held
there was no contravention of Cl. 12 —
Unless both termini were within the
State, Cl. 12 would not operate.

(Paras 7, 8)

Cases Referred : Chronological —
(1988) AIR 1988 Bom 48 (V 25) —
89 Bom L R 1062 = 89 Cri L J 19

Emperor v. Dagadu Shetiba

S. G. Mandrekar, for Petitioners (ques-
appeals), V. T. Gambhirwala, Asst. not is
Pleader for State. that
S. 1

ORDER.—Since these two revision
tions raise an exactly similar point, the
applications are being disposed of by one
ment although the incidents are different
the accused are also different.

Criminal Revision Application No. 249
of 1969.

2. The prosecution case was that upon in-
formation received by P. S. I. Dixit of Savant-
wadi that rice being transported from Kolha-
pur District to Savantwadi, a truck MYD 1182
was stopped at the Octroi Naka within Savant-
wadi limits on September 9, 1967 at about
1 a.m. On a search being made, it was found
that the truck contained 80 bags of rice. Those
bags were attached after a panchanama there-
of was made and the three persons in the
truck accused No. 1 who was driver, accused
No. 2 who was the cleaner and accused No. 3
who was sitting by the side of the driver were
put under arrest. The three accused were then
charged under S. 7 (i) (a) (ii) of the Essential
commodities Act, 1955, read with Cl. 12 of
the Maharashtra Scheduled Foodgrains (Stocks
Declaration and Procurement and Disposal,
Acquisition, Transport and Price Control)
Order, 1966 (hereinafter referred to as "the
said Order").

3. Clause 12 of the said Order on which
the charge was framed reads as follows.—

"No person, other than a recognised dealer,
shall transport, attempt to transport or abet
the transport of—

(a) rice from any village or any municipal
or cantonment area in the State to any area
in the State outside it, or vice versa."

(b) other foodgrains from any taluka in the
State to any area in the State outside it, or
vice versa, except under and in accordance
with an authorisation granted by the Collector
of the district within which or from which
such transport is to take place, or by any
officer authorised by such Collector."

There are certain provisos to this clause with
which, however, we are not concerned. In the
instant case neither of the three accused had
any authorisation for removal of rice from any
part of State to any part of the State.

4. The defence of the accused was that the goods were loaded at Belgaum and they were being taken to Banda, a place in Savantwadi Taluka in the Ratnagiri District.

5. Evidence was led by the prosecution J.M. which the learned Magistrate came to Public conclusion that the prosecution had proved the contravention of Cl. 12 of the said ORDER and held accused Nos. 1 and 2 guilty S. 433, C. S. 7 (1) (a) (ii) of the Essential Com- sions Judges' Act. Accused No 3 was acquitted. An to set aside filed by the accused was dismissed.

First Ct. Mr. Mandrekar appearing for the peti- complai- original accused Nos. 1 and 2, con- for pres- ed that the petitioners had in fact not

2. admitted any offence. It was pointed out by Mr. Mandrekar that a finding was given by the learned appellate Judge as follows: "There- fore on the evidence as it stands the truck came from Belgaum loaded with rice and had entered the Ratnagiri District at Amboli after crossing the Kolhapur District. The Octroi Naka clerk at Amboli, Amdoskar (Exh. 33) corroborates the fact that this truck entered the Ratnagiri District on 9th September 1967 and he also states that the accused told him that they had come from Belgaum." The fact therefore found was that the rice was loaded at Belgaum and it had entered Ratnagiri Dis- trict on September 9, 1967. Mr. Mandrekar's contention was that for rice which was brought from outside the State, the provisions of cl. 12 of the said order would not apply. Clause 12, the relevant part of which I have quoted above, refers to "transport, attempt to trans- port or abet the transport" of rice or food- grains. The word "transport" is defined in cl. 2 (p) of the said order. The definition is as follows :

"'transport' means movement from one place to another within the State."

7. What was urged by Mr. Mandrekar was that unless there was transport or attempt to transport or abetment of transport, the provisions of cl. 12 would not operate. The definition of "transport" showed that two destinations had to be pointed out, one from which it started and the other at which it was to end and within the definition of cl. 2 (p) of the said order, both these destinations had to be "within the State." Unless therefore those requirements were satisfied that the transport began from some place in the State and was to end at some place in the State, the provisions of cl. 12 of the said order would not apply to anything that was being re- moved

8. In the instant case, Mr. Mandrekar pointed out that a fact was found by the learned Sessions Judge concurring with the finding given by the learned Magistrate that

goods were coming from Belgaum to within Ratnagiri District. The rice therefore was not being transported from one place within the State to another place within the State. Mr. Mandrekar then referred to a decision of this Court in *Emperor v. Dagadu Shetiba*, 39 Bom L R 1062 = (AIR 1938 Bom 43), which dealt with the Bombay Abkari Act. While consider- ing the point regarding transport from place "A" to place "B", the learned Chief Justice observed as follows :—

"But merely passing through a place in the course of a journey does not, in my judgment, amount to transport to that place. In the pre- sent case, on the finding of the Magistrate, the accused was going to Poona and was merely passing through Bombay. That being so, I think the Magistrate was right in acquitting the accused, and the appeal is dismissed."

What was urged by Mr. Mandrekar was that these observations are clear enough to indicate that places in transit cannot be considered either as the start of a transport or the end of transport. If the rice had come in transit to a place in Kolhapur District and thereafter another place in Ratnagiri District, neither of these places could be considered either as places from where the transport begins or the places where the transport ends. Mr. Mandre- kar's argument therefore based upon the interpretation of the expression "transport" was that the ingredients of cl. 12 of the said order are not satisfied in the instant case. A clear finding is given that the transport began in Belgaum. The rest of the places were places in transit and the destination was cer- tainly within a District in the State. But even if the destination was within the State itself, the transport not having begun from a place in the State, the ingredients of cl. 12 of the said order are not satisfied by the prosecution. It must therefore be held that there was no con- travention of cl. 12 of the said Food Grains Control Order by those persons who were transporting the goods in the instant case. The conviction therefore has necessarily to be set aside.

9. Upon the goods being attached, the same were sold and by the order of conviction, the sale proceeds of rice were forfeited to Govern- ment under S. 517 of the Criminal P. C read with S. 7 (1) (a) (ii) of the Essential Commo- dities Act, 1955. Since the accused are not proved to have committed an offence, the order of forfeiture must also be set aside and the State has to be directed to return to the accused the amount of sale proceedings re- covered by it.

Order

10. Rule made absolute The order of con- viction of the accused Nos. 1 and 2 under S. 7 (1) (a) (ii) of the Essential Commodities

Act, 1955 read with cl. 12 of the Maharashtra Scheduled Foodgrains (Stocks Declaration and Procurement and Disposal, Acquisition, Transport and Price Control) Order, 1966, is set aside and the accused are acquitted. Their bail-bonds are cancelled.

11. The order of forfeiture of the sale proceeds is also set aside and the State is directed to refund to accused No. 1 the sale price recovered by it.

12. Fine if paid is ordered to be refunded.

*Criminal Revision Application
No. 306 of 1969.*

13. As the point was similar, this application was heard along with the revision application No. 249 of 1969. The facts of this case are that on September 11, 1967 truck No. G.D.T 6099 was halted by the police within the municipal limits of Savantwadi but on the Upral Municipal Octori Naka. The Upral Naka is on the road from Savantwadi to Kudal. On enquiries it was learnt that the goods were coming from Belgaum and proceeding to Kudal, a village within the Taluka of Savantwadi. It was the case of the prosecution that 71 bags of rice were loaded in the truck. On the allegations that an offence under S 7 (1) (a) (ii) of the Essential Commodities Act read with cl. 12 of the Maharashtra Scheduled Foodgrains (Stocks Declaration and Procurement and Disposal, Acquisition, Transport and Price Control) Order, 1966, the evidence was led. On the evidence the learned Magistrate came to the conclusion that the accused had committed the offence. Against the order of conviction, an appeal was filed but the same was dismissed.

14. The short point that arises in this petition is whether an offence under cl. 12 of the said Order was committed on facts which were found that the rice was sent from Belgaum to Kudal. Except for the fact that the destination of the rice in the instant case was Kudal whereas in revision Application No. 249 of 1969 the destination was Banda there is no difference in regard to the operation of cl. 12. I have in details dealt with this point in the other revision application. I have held therein that unless both the termini are within the State, cl. 12 of the said Order does not operate. In view of that position, the accused in this case also have to be acquitted.

15. The 71 bags of rice which were attached were sold by the State and an order of forfeiture of the sale-proceeds was passed by the Magistrate. This order was also confirmed by the appellate Court. In view of the fact that the prosecution failed to establish that any offence was committed, the order of forfeiture will also have to be set aside.

Order

16. Rule made absolute. The order of conviction and sentence passed against the accused is set aside and they are acquitted. The order of the forfeiture is also set aside and the State is directed to refund the amount of sale proceeds to accused No. 1. Fine if paid is to be refunded. Bail-bonds are cancelled with effect.

Rule made absolute.

1970 CRI. L. J. 1298 (Vol. 76, C. H. (CALCUTTA HIGH COURT))

T. P. MUKHERJI J.

Usharani Bej and others, Petitioners
Mongal Munda and another, Opposite Party.
Criminal Revn. Case No. 151 of 1969, D. 27.8.1968.

(A) Criminal P. C (1898), S. 144—Proceeding under — Sufficient material of apprehension of breach of peace should exist — Petition containing apprehension neither sworn nor stamped — No inquiry into allegations to avoid delay — Magistrate relying on report in previous enquiries—Report in previous inquiries not expressing apprehension of breach of peace — Held there was no sufficient material for apprehending breach of peace.

The foundation for a proceeding under S. 144 is the opinion of the Magistrate that there is sufficient ground for a proceeding under the section and his satisfaction that the direction that might be given, was likely to prevent, amongst others, the disturbance of the public tranquillity. The opinion and the satisfaction arrived at, must be on the sufficient material which gives the Magistrate necessary jurisdiction for the purpose of proceeding under the section. (Para 5)

Where the petition containing the apprehension of breach of peace was neither a sworn one nor was it duly stamped and the petitioner was not also examined, and the Magistrate did not direct enquiry into the allegations on the ground that it would entail delay and whatever satisfaction he arrived at was on the basis of the report of previous enquiries and also the order made by him in two previous cases and where in the report no apprehension of breach of peace was expressed by the enquiring officer :

Held : that the Magistrate had no sufficient material to satisfy as to the necessity for a proceeding under S. 144 and, therefore the proceedings were liable to be quashed.

(Paras 5 and 11)

(B) Criminal P. C. (1898), S. 144 — Successive orders under S. 144, deprecated.

Successive promulgation of orders under S. 144 to avoid the decision of a dispute as to the possession, is not contemplated by S. 144. That would be unjustifiable use of the Magistrate's powers which must be deprecated. An order under S. 144 cannot be made to serve as a prop to possession of disputed land without asking the party to have the remedy in the matter in the proper forum.

(Para 6)

(C) Criminal P. C. (1898), S. 145 (4) — Affidavits filed by parties take place of evidence — Order must indicate on the face consideration of affidavits — Mere statement that they were considered, is not enough — (Civil P. C (1908), O. 17, R. 1).

(Paras 9 and 11)

(D) Criminal P. C (1898), S. 145 (2), (8) — Dispute concerning "land or water" — Dispute over crop or produce divorced from land or water not covered.

A dispute under S. 145 has to be a dispute over land or water and when there is a dispute over land and water, any dispute over the crop or produce thereof would be included in that dispute provided the crop or produce are standing on the disputed land or water. No proceedings, therefore can be drawn under S. 145 in respect of a dispute concerning the crop of land divorced from the land itself. (1903) I L R 30 Cal 110 & A I R 1949 Pat 58 Foll.

(Paras 8 and 11)

(E) Criminal P. C. (1898), S. 145 — Order under — Pendency of civil suit between parties over disputed land — Issuance of an order of injunction by civil Court is sufficient step to prevent breach of peace—Simultaneous proceedings under S. 145 may induce conflict of jurisdiction and of decisions which is undesirable — Proceedings under S. 145 quashed.)

(Paras 6 & 11)

Cases Referred: Chronological Paras

(1949) AIR 1949 Pat 58 (V 36) = 49

Cr L J 612, Deonandan Singh v. Thakur Singh

7

(1903) ILR 30 Cal 110, Ramzan Ali v. Janardhan Singh

7

Harendra Nath Halder, for Petitioners; Arun Prokas Chatterjee, for Opposite Party No. 1.

ORDER—The second party to a proceeding under S. 145 of the Code of Criminal Procedure obtained this Rule against the order of the learned Magistrate in the proceeding declaring possession with the first party and restraining the second party men from inter-

fering with that possession except in due course of law. Opposite party No 1 as the first party applied to a Magistrate holding a camp Court at Kakdwip that he was in possession of certain lands as bhagidar, that the present petitioners have raised a dispute over that land and have been trying forcibly to harvest the standing crop with the help of *lathals*. Preventive action under S. 144 of the Code of Criminal Procedure was prayed for. It was further stated that over this dispute, the first party had earlier initiated a proceeding under S. 144 of the Code of Criminal Procedure in a case which was numbered M 13 of 1967 and that a restraint order under the section had been made in that case against the present petitioners.

2. The learned Magistrate in his order on this petition mentioned that he had seen a report of enquiry and the order made by him in cases Nos. M 13 of 1967 and M 207 of 1967. He found that an order of injunction under S. 144 of the Code of Criminal Procedure had been passed against the second party to the proceeding during the period of cultivation. As causing of an enquiry will entail delay and as there was a grave and serious apprehension of a breach of the peace according to the learned Magistrate, he issued an order under S. 144 of the Criminal P. C. upon the present petitioners restraining them from going upon the land in dispute.

3. On a subsequent date, the present petitioners appeared and filed an application and the proceeding under S. 144 was converted into one under S. 145 of the Code. The learned Magistrate at the same time appointed a caretaker receiver in respect of the standing crop. Both parties were directed to file their written statements, affidavits and documents in support of their respective claims and, on a consideration of these, the learned Magistrate found possession with the first party who is the opposite party No. 1 in the present rule. It is against this order that the rule is directed.

4. Mr. Halder appearing in support of the rule contends that there were no materials whatsoever before the learned Magistrate to satisfy him about the necessity for action under S. 144 of the Code and that if there were no such materials which could have provided the necessary satisfaction in that regard, the proceeding that was drawn up was without jurisdiction. The second objection to the proceeding is that the dispute as to the share of the paddy grown on the land concerned is not a dispute as to "land and water" which might justify a proceeding. The third contention is that the affidavits filed by the respective parties were never considered by the learned Magistrate in coming to his finding on the question of pos-

session and, lastly, that a suit over the land in dispute being pending in the civil Court between the parties, a proceeding under S. 144 of the Criminal P. C. was unwarranted and it was improper of the learned Magistrate to have drawn up the proceeding.

5. The foundation for a proceeding under S. 144 of the Criminal P. C. is the opinion of the Magistrate concerned that there is sufficient ground for a proceeding under the section and his satisfaction that the direction that might be given was likely to prevent amongst others disturbance of the public tranquillity. The opinion and the satisfaction must be arrived at on sufficient materials and it is this opinion and satisfaction arrived at on the basis of sufficient materials which gives the Magistrate the necessary jurisdiction for the purpose of a proceeding under the section. In the present case, the learned Magistrate has stated in his order dated November 18, 1967, that there is grave and serious apprehension of a breach of the peace. This apprehension was no doubt given out in the petition that was filed. The petition is unstamped and is not a sworn petition. The petitioner was not examined by the learned Magistrate. Nobody took the responsibility for the statements that were made therein. The learned Magistrate did not direct an enquiry into the allegations on the ground that it will entail delay and whatever satisfaction he arrived at was arrived at by him on the basis of the report of a previous enquiry and the order made by him in two previous cases. One of these two cases is case No. M/13 of 1967. A certified copy of the report of enquiry in that case was handed up to me. Nowhere in the report was any apprehension of a breach of the peace expressed by the enquiring officer.

6. It would appear from the report of the enquiry referred to above and also from the order of the learned Magistrate himself that there was a previous dispute over this land between the parties during the period of cultivation. An order under S. 144 of the Code had been made at the time restraining the present petitioners from interfering with the opposite party's possession in the land. Again, at the time of harvesting a fresh order to the same effect was made under S. 144. There was thus a standing dispute over this land between the parties. Successive promulgation of orders under the section to avoid a decision of the dispute as to possession is not contemplated by S. 144. That would be an unjustifiable use of the Magistrate's powers under the section which must be deprecated. The learned Magistrate could no doubt have proceeded under S. 145 or under S. 107 of the Criminal P. C. but an order under S. 144 cannot be made to serve as a prop to posses-

sion in disputed land without the party asking for that order having to seek the proper remedy in the matter in the proper forum. The order of the learned Magistrate, I find, suffers from two defects. The record does not show that he had sufficient materials to satisfy him as to the necessity for a proceeding under S. 144. Secondly, the order was being made to serve as a prop to possession in disputed land without the party concerned having to seek the proper remedy in the civil Court. As a matter of fact, I find from the record that a civil suit between the parties over this land was pending at the time and an order of injunction had already been issued by the civil Court restraining the present opposite party No. 1 from interfering with the present petitioner's possession in the land concerned. By drawing up a proceeding under S. 144, the learned Magistrate induced a conflict of jurisdiction and a conflict of decisions which is most undesirable. When the dispute had been taken cognisance of by the civil Court which had already issued an order of injunction, that should have been treated as sufficient to prevent any breach of the peace. It was not proper in the circumstances to draw up a proceeding under S. 144 and then to proceed in a manner in conflict with the orders made by the civil Court.

7. In the proceeding that was drawn up, the dispute is stated to be concerning "the share of paddy" of the lands mentioned in the schedule attached thereto. This proceeding was drawn up after the proceeding under S. 144 had been converted into one under S. 145. This latter section appears in Chap. XII of the Criminal P. C. which deals with disputes as to immovable property. The question that is raised is whether a dispute concerning share of paddy can be covered by the section. Mr. Chatterjee appearing for the opposite party refers to sub-s (2) of the section which says that the expression "land or water" includes buildings, markets, fisheries, crops or other produce of the land, and the rents or profits of any such property and the argument on the strength of this definition is that a dispute over the produce of land can be the subject of a proceeding under S. 145. In support of this contention, Mr. Chatterjee refers to a decision of this Court in *Ramzan Ali v. Janardhan Singh*, (1903) ILR 30 Cal 110, and to a decision of the Patna High Court in *Deonandan Singh v. Thakur Singh*, AIR 1949 Pat 58. Neither of these two cases, in my view, supports the contention of Mr. Chatterjee. In *Ramzan Ali's* case, (1903) ILR 30 Cal 110, the subject-matter of the dispute was crops which had been cut and stored on the threshing floor and it was held that harvested crop being movable property cannot be the subject of a dispute as contemplated

under S. 145. In the Patna case, the subject of dispute was 50 to 60 bighas of land and that portion of the learned Magistrate's order in a proceeding under S. 145 of the Code was challenged which covered within the dispute the paddy harvested from a portion of his land before the initiation of the proceeding and stored on same other land. This decision refers to Ramzan Ali's case and therein, therewith held that as the impugned portion of the order related to movable property in the shape of harvested paddy stored on the land which was not the subject-matter of the dispute, the dispute relating thereto is not such as is covered by S. 145 of the Code.

8. A dispute under S. 145 of the Code has to be a dispute over land or water and according to the definition of the term "land or water" crops or other produce of the land are included in the term, which only means that when there is a dispute over land or water, any dispute over the crops or other produce thereof would be included in that dispute, but the crops or other produce have to be standing crops on the disputed land at the time the proceeding is drawn up. That there cannot be any dispute over crops or produce of land divorced from the land itself would be apparent from sub-section (8) of the section which relates to the disposal of the crop or produce pending the proceeding. The opening words of the sub-section are to the following effect:

"If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him * * *

It is clear, therefore, that the subject of the proceeding is the property, any crop or other produce whereof might be disposed of in accordance with the provisions of the sub-section. In my view, no proceeding under S. 145 of the Code can be drawn up over a dispute concerning the crop of land divorced from the land itself. If however, there is a dispute over land, that dispute will cover the crop standing thereon. And that is exactly what the definition of the term "land or water" in sub-section (2) of the section means when it says that the expression "land or water" includes amongst others crops or other produce of the land. The learned Magistrate, in my view, fell into an error in drawing up a proceeding under S. 145 of the Code over a dispute concerning merely the share of paddy of the land.

9. The third contention relates to the non-consideration of the affidavits filed by the respective parties. The learned magistrate does not appear from the order passed by him to have directed his attention to the contents of the affidavits that were filed. He states no

doubt in his order that he has carefully considered the written statements, documents and affidavits filed by both the parties, but that is not enough. The order that is made must indicate on the face of it that there was such consideration of the materials that were produced. Affidavits take the place of evidence under S. 145 of the Code. Although the procedure is of a summary nature, there must be some indication in the order that is passed, that the contents of the affidavits really came into the consideration of the learned magistrate. As the order in the present case does not disclose that the learned magistrate's attention was directed to the contents of the affidavits, the order is not a proper order that is made on a consideration of all the materials produced before him.

10. The last objection relates to the propriety of the proceeding in view of the pending title suit between the parties over the said property. I have dealt with this objection earlier. I do not want to carry the idea that when a title suit is pending, the learned magistrate's hands are tied and that under no circumstance he could make an order under S. 144 of the Code. In this case, as the record indicates, there is not only a suit pending but an order of injunction had been made by the civil Court in the pending suit. That should have been treated as sufficient steps taken to prevent a breach of the peace. If in spite of that any action was thought necessary, it should be in consonance with the civil Court's order.

11. Considering all that I have stated above, the order made by the learned Magistrate must be held to be unsustainable. As there was no sufficient foundation for the satisfaction of the learned magistrate, the proceeding itself is liable to be quashed. The proceeding is liable to be quashed in view of the pending title suit between the parties. The proceeding was also liable to be quashed in view of the fact that the learned magistrate had no jurisdiction to start the proceeding in a dispute over a share of the paddy and the order was also liable to be set aside because of the non-consideration of the affidavits that were filed in the case.

12. In view of all this, the Rule is made absolute. The entire proceeding under S. 145 of the Code of Criminal Procedure in the case is quashed.

Petition allowed.

1970 CRI. L. J. 1302 (Vol. 76, C. H. 338)

(DELHI HIGH COURT)

S. RANGARAJAN, J.

Balbir Singh, Petitioner v. Prem Wati, Respondent

Cri. Revn. No 190 of 1969, D/- 5.3.1970, against order of Addl. S. J. Delhi, D/- 11.4.1969.

Criminal P. C. (1898), S. 488 (6) — Ex parte Order—Setting aside of—Aggrieved party can apply to get it set aside beyond three months on good cause being shown. AIR 1966 A P 6) Relied on; 1952 (2) Cri L J 581 (Punj) and AIR 1950 Mad 153, Dissented; AIR 1961 SC 1500 Referred to. (Para 4)

Cases Referred: Chronological Paras

(1966) AIR 1966 Andh Pra 50 (V 58)=

1966 Cri L J 129, Zohra Begum v.

Mahommed Ghose Qadri (Qadeeri)

(1962) 1962 (2) Cri L J 581=61 Pun

L R 53, Hari Singh Ishar Singh

Jat v Mst Dhanno Hari Singh

(1961) AIR 1961 S C 1500 (V 43)=

1962-1 S C R 676, Raja Harish Chandra Raj Singh v. Dy. Land Acquisition

Officer

(1951) AIR 1951 Mad 204 (V 88)=

I L R (1951) Mad 815, O. A. O. A. M.

Muthiah Chettiar v. Commr. of I. T.

(1950) AIR 1950 Mad 153 (V 87)=51

Cri L J 455, A. S. Govindan v. Mrs.

Margaret Jayammal

Chander Bhan, for Petitioner.

ORDER —The learned Additional Sessions Judge has recommended that this Court may quash the order of the Sub.Divisional Magistrate, Delhi (Shri K. K. Bhasin) dated 23rd January 1969 dismissing the application made by the husband dated 6th December 1963, praying to set aside an ex parte decree of maintenance under S. 488 of the Code of Criminal Procedure in favour of his wife and child, on the ground that the same had not been filed within three months of the date of the ex parte decree as required by S. 488 (6) of the Code of Criminal Procedure. Sub-s (6) of S. 488 reads as follows—

"All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases.

"Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case

ex parte. Any orders so made may be set aside for good cause shown, on application made within three months from the date thereof."

2. It was stated by the husband that he came to know of process issued by the Court under S. 488 of the Code of Criminal Procedure from his relations and when he inquired the Court records on the 4th December, 1963, he came to know that an ex parte order for maintenance under S. 488, Criminal P. C. had been passed against him on the basis that he had refused to receive the notice sent from the Court. He alleged that this endorsement of refusal of notice by him was not true. The learned Magistrate did not go into this question of the time at which the husband came to know of the passing of the said decree, because in his view no application for setting aside an ex parte order made under S. 488, Criminal P. C. could be made after three months from the date of the said order. In other words, this view totally eliminated any reference to the knowledge of the person against whom such an order was made.

Shri Chander Bhan, learned counsel for the husband, has very fairly, in the absence of the respondent or her counsel, drawn my attention to the view of the Punjab High Court in Hari Singh Ishar Singh Jat v. Mst Dhanno Hari Singh, 1962 (2) Cri L J 581 (Punj), Gurdev Singh J., following the decision of Somasundaram J., in A. S. Govindan v. Mrs. Margaret Jayammal, AIR 1950 Mad 153, held that the three months' period mentioned in S. 488 (6), Criminal P. C., did not mean three months from the date of the knowledge of the order. Support was derived for this view on the basis of the legislature not mentioning the knowledge of the person affected (if that was the case) as it did in some other statutes. In a different context, Raja Mannar C. J., observed in O. A. O. A. M. Muthiah Chettiar v. Commr. of Income-tax, AIR 1951 Mad 204 that if a person is given a right to resort to the remedy of getting rid of an adverse order within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order. Since this is the basic approach to a period of limitation of this description I respectfully disagree with the view taken by Somasundaram J. in A. S. Govindan, AIR 1950 Mad 153 and also by Gurdev Singh J. in Hari Singh Ishar Singh, 1962 (2) Cri L J 581 (Punj).

3. That limitation in such a case commences to run only from the date of the knowledge of the order to the aggrieved party and not from the date of the passing of the order is a prin-

ciple of general application. It would be needless to multiply authorities on this question. Reference, however, can be made to the decision of the Supreme Court in *Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Officer*, AIR 1961 S C 1500, That was a case under the Land Acquisition Act. The expression "the date of the award" used in proviso (b) to S. 18(4) of the Land Acquisition Act was held to mean the date when the award was either communicated to the party or was known by him either actually or constructively.

Jaganmohan Reddy J. (as his Lordship then as) held in *Zohra Begum v. Mohamed Ghose* and *Qadeeri*, AIR 1966 Andh Pra 50 in a case arising under S. 488(6) of the Criminal P. C., itself, following the above said decision of the Supreme Court, that the date of the ex parte order referred to in the said provision would take in cases where the aggrieved party had knowledge of the said order at a later date. The decision of *Somasundaram J.* in *A. S. Govindan* AIR 1950 Mad 153 was not followed, that of *Rajamannar C. J.*, in *Muthiah Chettiar* AIR 1951 Mad 204 was followed.

4. I, therefore, hold that a person aggrieved by an ex parte order made under S. 488 of the Criminal P. C., can apply even more than three months after the date of the ex parte order if he can show good cause why the said order has to be set aside. On this question, namely, as to when the husband came to know of the said order, there has been no determination by the trying Magistrate. The trying Magistrate would, therefore, go into the question as to when the husband came to know of the proceedings under S. 488, Criminal P. C. and of the passing of the ex parte order and whether the said knowledge was obtained by the husband within three months of the filing of the said application to set aside that order. The trying Magistrate will also go into this question whether there is good cause to set aside the ex parte order. The reference of the learned Additional Sessions Judge is accordingly accepted.

5. The parties will appear before the trying Magistrate on 24th March 1970. Since neither the wife nor her counsel is present during the hearing of this petition I consider it necessary to direct that if the wife does not appear before the learned trying Magistrate on that date he will issue notice to the wife for the hearing of this application by the husband for an actual date to be fixed by him thereafter.

Reference accepted.

1970 CRI. L. J 1303 (Vol 76, C. N. 339)
(DELHI HIGH COURT-HIMACHAL BENCH)

OM PARKASH, J.

State of Himachal Pradesh, Petitioner v. Shri Rama Mal, Respondent.

Criminal Revn. Appls. Nos. 60 to 62 of 1969, D/-10.8.1970.

(A) Criminal P. C. (1898), S. 243 — Conviction on admission — Accused while pleading guilty also setting forth circumstances tending to exonerate him — Statement not an unqualified admission of guilt — Conviction on such statement is illegal. (Para 8)

(B) Criminal P. C. (1898), S. 251 — Procedure in warrant cases — Prosecution under S. 7 (1) (a) (ii) read with S. 3 (2) (d) of Essential Commodities Act — Imprisonment provided therefor being three years and fine, case is warrant case within S. 4 (1) (w) of Criminal P. C. — Magistrate following procedure of summons cases vitiates trial. (1902) I L R 25 Mad 61 & AIR 1947 P C 67, Rel. on. (Para 9)

(C) Criminal P. C. (1898), S. 439 — Powers of High Court in revision — Conviction of accused under S. 7 read with S. 3 of Essential Commodities Act — On appeal Sessions Judge finding conviction and trial to be illegal but not directing retrial — Revision by State — Accused faced trial in three cases and suffered heavy losses because of deterioration of foodgrains — Absence of mens rea — Order of Sessions Judge not interfered in revision. (Para 10)

(D) Essential Commodities Act (1955), S. 7 — Penalties — Mens rea is an essential ingredient of offence under S. 7 — AIR 1966 S C 43, Rel. on. (Para 10)

Cases Referred: Chronological Paras
(1966) AIR 1966 S C 48 (V 53) = 1966

Cri L J 71, *Nathulal v. State of M. P.* 10

(1947) AIR 1947 P C 67 (V 34) = 48

Cri L J 533, *Pullukuri Kottaya v.*

Emperor 9

(1902) ILR 25 Mad 61 = 28 Ind App

257 (PO), *Subrahmania Ayyar v.*

King-Emperor 9

R. K. Punshi, for Petitioner; H. S. Bedi, for Respondent.

ORDER: — This order will dispose of criminal revision petitions Nos. 60, 61 and 62 of 1969.

2. The police had put up three separate challans, under S. 7, read with S. 3 of the Essential Commodities Act, 1955, against the

respondent. The case for the prosecution was that Shri Kabul Singh, Inspector of Civil Supplies Department, Dharamsala, had, on the 19th October, 1967, raided the premises of Krishan Chand and Tej Ram situated in village Mutli and the premises of Kalu Ram in village Shekhpur and had recovered 75 bags of rice and 25 bags of gram from the premises of Krishan Chand; 75 bags of rice, 25 bags of gram and 28 bags of wheat from the premises of Tej Ram and 50 bags of rice, 60 bags of gram and 15 bags of white gram from the premises of Kalu Ram. According to the prosecution, the aforesaid foodgrains had been stored by the respondent without a licence, as required by the Punjab Foodgrains Dealers' Licencing Order, 1964 and the Punjab Rice Dealers' Licencing Order, 1964. The respondent was prosecuted for the contravention of the provisions of the aforesaid two orders and three separate challans were put against him.

3. The respondent had appeared in the three cases before the Magistrate first class on 20th May, 1968. The Magistrate first class had explained the accusation levelled against the respondent. The respondent had made the following statement:

"I plead guilty. It is correct that I had in fact purchased 351 bags of foodgrains consisting of 200 bags of rice, 111 bags of black gram, 15 bags of white gram and 28 bags of wheat for sale on 18.10.1967 which I had stored at three different places taken on rent The Food and Supplies Inspector raided that place on 19.10.1967 and sealed the same. Subsequently the Police took into possession the entire stock.

I had applied for requisite licence for carrying on the business as Foodgrains Dealer, about 8 days before the purchase of the stock, which I had purchased in anticipation of the grant of that licence. I was under the impression that only the sale of foodgrains was prohibited by law and not its purchase. I, accordingly, made no sale nor did I intend to make any sale till the grant of licence.

The stock remained in Police custody right from 19.10.1967 till 16.5.1968 when I received it back on Superdari. During this period the entire stock, especially the gram has been highly damaged as also reduced in quantity. It has depreciated by about 30 per cent in value. I have already suffered loss of over Rs. 20,000 in this transaction."

4. The trial Magistrate convicted the respondent on the basis of the above statement, taking it as a plea of guilty of the offences for which the respondent was hauled up. The respondent was sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 2,000 in each case.

5. Aggrieved by the orders of the trial Magistrate, the respondent filed three revision petitions in the Court of Session, Kangra at Dharamsala.

6. The learned Sessions Judge had set aside the statement made by the respondent and held that it was not an unqualified admission of the offence for which he had been hauled up and that the trial Magistrate committed an illegal act in treating the statement as a plea of guilty and in convicting the respondent on the basis of the statement. The learned Sessions Judge further held that the trial Magistrate committed another illegality in trying the cases on the basis of his findings, the learned Sessions Judge set aside the conviction of the respondent in all the three cases. He did not order retrial as in his view the respondent had already suffered the harassment of a trial and had also suffered heavy losses on account of the foodgrains having been deteriorated while in the custody of the Police.

7. The State has filed three criminal revision petitions against the order of the learned Sessions Judge.

8. It was contended by the learned counsel for the State that the learned Sessions Judge was in error in holding that the statement made by the respondent did not amount to a plea of guilty. The contention has no substance. The statement made by the respondent has been reproduced in an earlier part of this order. It is clear from the perusal of the statement that though the respondent had stated that he pleaded guilty, yet he had set forth many circumstances which exonerated him.

The respondent had stated that he had stored the foodgrains under the bona fide belief that storage was not prohibited, but only sale was prohibited. The respondent had further stated he had applied for the licence for carrying on business as Foodgrains Dealer about 8 days before the purchase of the foodgrains and that he had purchased the foodgrains in anticipation of the grant of the licence. The aforesaid circumstances tended to exonerate the respondent. The statement made by the respondent was not an unqualified admission of his guilt. It did not amount to a plea of guilty. The learned Sessions Judge was, therefore, right in holding that the trial Magistrate erred in treating the statement as plea of guilty and in basing the conviction on that statement.

9. Though in the grounds of revision, it was stated that the cases were summons cases, yet at the time of arguments the learned counsel for the State conceded that the cases against the respondent were warrant cases and

should have been tried as such. The respondent was hauled up for the contravention of the provisions of the Punjab Foodgrains Dealers Licencing Order, 1964 and the Punjab Rice Dealers' Licencing Order, 1964. These orders were promulgated in exercise of the powers conferred by clause (d), sub-s. (2) of S. 8 of the Essential Commodities Act. The imprisonment for the contravention of the above orders may extend to three years and ne, vide, S. 7 (1) (a) (ii), Essential Commodities Act.

The cases filed against the respondent were, therefore, warrant cases within the meaning S. 4 (1) (w), Code of Criminal Procedure. They should have been tried as such. The Magistrate had adopted the mode of trial of summons cases and not of warrant cases. The trial of the cases was conducted in a manner different from that prescribed by the Code of Criminal Procedure. In such a situation, the trial is bad vide *Subrahmanya Ayyar v. King Emperor* (1902) ILR 25 Mad 61 and *Pullukuri Kottaya v. Emperor*, AIR 1947 P C 67.

10. It was, next, contended by the learned counsel for the State that the learned Sessions Judge grievously erred in not directing a retrial of the cases. The learned Sessions Judge has pointed out that the respondent had already faced a trial in the three cases and that he had suffered heavy loss because of the deterioration of the foodgrains. The foodgrains recovered had remained with the Police from 19.10.1967 to 16.5.1968. They had deteriorated in value to the extent of 50 per cent. The respondent had stated in his statement that he had suffered a loss of Rs. 20,000/- on account of the deterioration of the condition of the foodgrains. The respondent had also stated that he had applied for taking out licence as a Foodgrains Dealer and had purchased the foodgrains in anticipation of the grant of licence.

This statement indicates that the respondent had no intention to violate the provisions of the aforesaid two orders. Mens rea is an essential ingredient of an offence under S. 7 of the Essential Commodities Act, vide *Nathulal v. State of Madhya Pradesh*, AIR 1966 S C 43. In the present case mens rea was lacking. Keeping in view all the circumstances of the case, it will not be just for this Court to interfere with the orders of the learned Sessions Judge in exercise of the revisional powers of this Court.

11. No other point was urged in the revision petition which are dismissed.

Petitions dismissed.

1970 CRI. L. J. 1305 (Vol. 76, C. N. 340)
(GUJARAT HIGH COURT)

J. B. MEHTA AND A. D. DESAI JJ.

Assistant Collector Customs, Baroda and another, Appellants v. Mukbujsein Ibrahim Pirjada, Respondent.

Criminal Appeal No. 245 of 1967, D/- 7.2.1969.

(A) Customs Act (1962), S. 123 (1) and (2)—Presumption under—Gold must have been seized under the Act—Seizure of gold first by police—Subsequent transfer of gold and panchanama to Customs authorities—Gold cannot be said to be seized under the Act—No presumption arises.

In order to attract the presumption under S. 123, the goods must be shown to have been seized under the Act from the possession of the accused by the Customs authorities. If the goods are originally seized by the police authorities from the possession of the accused, the accused loses possession by seizure under the provisions of the Criminal Procedure Code and thereafter, the possession vests in the police authorities. If thereafter the customs authorities get the custody of these goods, they cannot be said to have seized under the Act so as to throw the burden on the accused to prove that the gold in question was not smuggled gold. A I R 1962 S C 496, Rel. on; A I R 1967 Bom 188 and A I R 1968 Cal 274, Dist. (Para 8).

(B) Customs Act (1962), S. 123 (1) and (2)—Presumption under—Existence of foreign marking cannot lead to such presumption—Such marks are hearsay evidence. 1966 A C 367, Ref. (Para 4)

Cases Referred: Chronological Paras
(1968) AIR 1968 Cal 274 (V 55)=1968

Cri LJ 744, Deputy Supdt., Customs v. Sitaram

(1967) AIR 1967 Bom 138 (V 54)=
1967 Cri L J 715, Vasantlal v. Union of India

(1966) 1966 A C 367, Comptroller of Customs v. Western Electric Co. Ltd.

(1962) AIR 1962 S C 496 (V 49)=
1962 (1) Cri L J 485, Gian Chand v. State of Punjab

J. U. Mehta Asst. Govt. Pleader, for the State, M. R. Barot with B. L. Barot and Indravadan Shah, for Respondent.

MEHTA J. — The plaintiff Assistant Collector, Customs, Baroda, and the State of Gujarat have filed this appeal against the acquittal of the original accused No. 1 for the offence under S. 135 (b) (i) of the Customs Act, 1962. The case of the prosecution was

that on September 28, 1968, at about 3.15 A.M., accused No. 1, Mukbul Husain alighted at Baroda from the Janta Express train coming from Bombay. While he was passing through the third class passengers' Exit gate, police constable Navalsing stopped him at the gate as the accused was not able to give satisfactory answers when he was found carrying a hand bag. The accused was detained and the police constable Jivamiya was called. The hand-bag of the accused was searched and 50 bars of gold each weighing 10 Tola, worth about Rs 70,000/- were found from the accused's (the) bag inside the hand-bag. The gold bars are alleged to have foreign markings "K. M. ROTHSCHILD & SONS 10 Tolas, 993.00". Panchanama Ex. 12 was made of the seizure of the gold. The Police-station Officer Dayashanker arrested the accused under S. 54 (4), Criminal P. C. Thereafter, the Circle Police Inspector Rathod informed the Customs Authorities and handed over the accused, muddamal articles for which the receipt Ex. 14 was issued and the panchanama papers to the Deputy Superintendent of Central Excise Mr. Dixit. Mr. Dixit made fresh panchanama Ex. 16 of the seizure of these goods. After a sanction was obtained the Assistant Collector Customs, filed a complaint against the present accused and two other persons, one Mohamad Sahi, who was alleged to have purchased the gold with money and sent through the accused No. 1 by one Ismail Haji, accused No. 3 to whom ultimately this gold was to be delivered. All the accused were put up for trial for the charge under S. 135 of the Customs Act, 1962, hereinafter referred to as 'the Act' for possessing, acquiring and dealing with the prohibited gold of foreign marks which was liable to be confiscated under S. 111 of the Act. The plea of the accused was of complete denial. Accused No. 1 stated that Safi met him in Bombay and handed over to him the bag to be delivered to his brother Gulam at Baroda. He did not know the contents and put the same in his hand bag. The learned Magistrate acquitted the other two accused. The learned Magistrate held that so far as accused No. 1 was concerned, in view of the seizure of the goods by the Customs Officers, presumption under section 123 was attracted and the burden was on the accused to show that the gold was not smuggled gold. The learned Magistrate, therefore, convicted the accused No. 1 for the offence under section 135 (b) (i) of the Act and sentenced him to suffer R. I. for three months and a fine of Rs 1,000, in default, rigorous imprisonment for four months. In appeal, the learned Sessions Judge has acquitted the accused on the ground that as the goods were seized by the Police, the presumption under section 123 was not attracted. The

prosecution having failed to prove the gold in question to be smuggled gold, the accused No. 1 also was acquitted. Against this order the present appeal is filed.

2. On the facts in the present case, it can be no dispute that the gold in question was seized by the Police authorities from the accused No. 1 on 28.9.1968 as per panchanama Ex. 12 and the receipt was passed in that connection. Mr. Mehtra, the Assistant Government Pleader, who appeared for the accused, argued that the panch witness has not proved that at the time of the panchanama made by the Customs authorities the gold bars were seized from the accused No. 1. There is no substance in this contention. The panch witness Navinchandra Thakkar can hardly be believed in this connection. The Police Inspector Mr. Rathod had in terms deposed that when Mr. Dixit the Customs officer came to him, he made over the muddamal articles, papers and accused to him as per the Yadi Ex. 15 which in terms recites this fact. Mr. Dixit in terms deposes that on September 28, 1968, the muddamal articles seized by the Railway Police had been handed over to him as per Yadi Ex. 15. He took the custody of these articles, accused and the police papers and took them to the Customs Preventive Office before even he drew the panchanama Ex. 16. It is therefore, clear that the panchanama Ex. 16 is not of the seizure of the goods from the accused but it is only a paper panchanama of the delivery of the goods. It is only a paper panchanama which would show that the goods which were seized by the police authorities were kept in the custody of the Customs authorities. Therefore, the goods having not been seized by the Customs authorities from the possession of the accused, the presumption under section 123 would not be attracted in this case.

3. Section 123 (1) in terms provide that where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled gold shall be on the person from whose possession the goods were seized. (2) This section shall apply to gold . . . and any other class of goods which the Central Government may by notification in the Official Gazette specify. Therefore, presumption in case of gold can arise under section 123 (1) and (2) provided gold is seized under the Act by the Customs authorities from the possession of the accused. In the present case gold was seized not by the Customs authorities under the Act but by the Police authorities under the provisions of Criminal Procedure Code after the accused No. 1 was arrested under section 54 (4) under the

panchanama Ex. 12. Therefore, the seizure was not under the Act but de hors the Act, when it was done by the police authorities. The accused having lost possession of these goods by this act of seizure by the police authorities, there was no question of the seizure of the same goods when their custody was transferred to the Customs authorities by the Police authorities. Merely making of a fresh panchanama Ex. 16 would not amount to a seizure of the goods under the Act from the possession of the accused so as to throw the burden on the accused to prove that the gold in question was not smuggled gold. The position of law in this connection is well settled by the decision of the Supreme Court in *Chand v. State of Punjab*, AIR 1962 S C 67, where their Lordships of the Supreme Court interpreted an identical, corresponding provision in section 178-A of the Sea Customs Act, 1878. At page 499, their Lordships of the Supreme Court observed that the last part of sub-section (1) of section 178-A lays the burden of proving that the goods are not smuggled on "the person from whose possession the goods are taken." Assuredly when the goods are delivered to the Customs authorities by the Magistrate, they are not taken from the possession of the persons accused in criminal case so as to throw the burden of proof on them and it would lead to an absurdity to hold that the section contemplated "proof to the contrary" by the Magistrate under whose orders the delivery was effected. Their Lordships further pointed out that when the goods were seized by the police, they ceased to be in the possession of the accused and passed into the possession of the police, and when they were with the Magistrate it was unnecessary to consider whether the Magistrate had possession or merely custody of the goods. Because the seizure under the authority of law involves a deprivation of possession and not merely custody and so when the police officer seized the goods, the accused lost possession which thereafter vested in the police. When that possession was transferred by virtue of the provisions contained in S. 180 to the Customs authorities, there was no fresh seizure under the Customs Act. This decision furnishes a complete answer to the present question that in order to attract the presumption under S. 123, the goods must be shown to have been seized under the Act from the possession of the accused by the Customs authorities. If the goods were originally seized by the Police authorities from the possession of the accused, the accused lost possession by seizure under the provisions of the Criminal Procedure Code and, thereafter, the possession vested in the Police authorities. If thereafter the customs authorities got the

custody of these goods they could not be said to have seized under the Act so as to throw the burden on the accused to prove that the gold in question was not smuggled gold. Mr. Mehta vehemently argued that the decision of the Supreme Court was in connection with S. 180 of the Sea Customs Act. There is no substance in that contention as the decision is clearly based on the wording of the identical S. 178A. The decision in terms lays down that the burden would be thrown on the accused only when the goods are seized under the Act from the possession of the accused. If the possession of the accused is lost by the seizure of the goods by the Police authorities, the presumption under S. 123 would not arise. Mr. Mehta next relied upon the decision of the Maharashtra High Court in *Vasantlal v. Union of India*, AIR 1967 Bom 138, by the Division Bench consisting of Chinnani C. J. and Kotwal J. That decision cannot help Mr. Mehta for the simple reason that in that case the goods were wrongfully seized by the Officer of the Enforcement Department who was not competent to do so and, therefore, it was held that when they were first lawfully seized by the Customs authorities, it was a case of seizure under the Act and it was on that ground that the decision in *Gian Chands' case*, AIR 1962 S C 496 was not distinguished. That decision does not help Mr. Mehta for the simple reason that in the present case the Police Officer was entitled to seize the goods under the provisions of the Criminal Procedure Code, when the accused was arrested under S. 54 (4). Mr. Mehta also relied upon the decision of *Mukherji J. in Deputy Supdt., Customs v. Sitaram*, AIR 1968 Cal 274. That is a case where the goods which were in the custody of the Magistrate were ordered to be delivered to the Customs authorities. That decision can never help Mr. Mehta for contending that the goods which had been seized by the Police authorities and by which the accused lost possession could be said to have been again seized from the accused under the Act so as to throw the burden of proof under S. 123 (1). Therefore, the learned Sessions Judge was right in holding that in this case the presumption under S. 123 (1) could not help the prosecution and the prosecution must prove the essential ingredient of the offence by proving that the gold in question was smuggled gold.

4. Mr. Mehta in this connection vehemently relied on the fact that the gold in question had marks of foreign origin. It is well settled that mere markings could not be taken as proof of the fact of the foreign origin of the goods as such marking and labels would be hearsay evidence. In *Comptroller of Customs v. Western Electric Co. Ltd.*, 1966 A C 367,

their Lordships of the Privy Council in terms held at p. 889 that such marking must be excluded from consideration as being no more than hearsay. When the question arose as to the country of origin of the goods, Mr. Mehta next argued that the reports Exs 10 and 21 from the Mint Master proved that the fineness of gold to the extent of 998.8 was such that the gold must be of foreign origin. The Mint Master has not been examined in this case and Mr. Mehta has not pointed out any provision which would make the report of the Mint Master the evidence of this fact. The evidence of the Goldsmith can hardly help this prosecution. In fact, Mr. Dixit himself admitted that even after the prohibition was issued for import of gold of the type seized, on permit of Reserve Bank, Government or any private party could imprint gold with such marks. Therefore, there is no iota of evidence in the present case to prove that the gold in question was smuggled gold. The mere fact that the accused was in possession of this gold and such possession was a conscious possession because of the various circumstances mentioned by the learned Magistrate would not prove the essential ingredient of the offence that the gold in question was smuggled gold. The learned Sessions Judge was right in acquitting the accused on that ground as the charge was not brought home to the accused No. 1.

5 In the result this appeal fails and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 1308 (Vol. 76, C. N. 341)
(GUJARAT HIGH COURT)

N. G. SHELAT J.

Mansukhlal Vallabhdas, Petitioner v. Mangalaben Jerambhai and another, Opponents.

Criminal Revn Appln. No. 487 of 1967, D/- 6.8.1969, against Order of S. J. Jamnagar in Cri. Revn. Appln. No. 11 of 1967.

(A) Criminal P. C. (1898), S. 488 — Words “in any district where he resides or is or where he last resided with his wife” in S. 488 (8) — Contemplate the district in which they last resided—They do not refer to any place so as to give jurisdiction to the Court within which that place is situated : AIR 1965 Bom 107 and AIR 1963 Guj 91, Rel. on. (Para 4)

(B) Criminal P. C. (1898), S. 488 — Wife's right to refuse to live with husband and claim maintenance—Deliberate

False attribution of immorality to wife—She is entitled to live separately and claim maintenance : A I R 1950 Mad 335 and AIR 1950 Mad 394, Rel. on. (Para 7)

Cases Referred : Chronological Paras

(1965) AIR 1965 Bom 107 (V 351)

1965 (2) Cri L J 73, Sham

Vishnupant v. Vishnupant Atma

Kullarni

(1963) AIR 1963 Guj 91 (V 346)

1963 (1) Cri L J 591, Amalal

ramdas Patel v. Dahiben Dabyab

Patel

(1961) AIR 1961 S C 1629 (V 18)

1961 (2) Cri L J 511, Ram Chandra

Prasad v. State of Bihar

(1950) A I R 1950 Mad 385 (V 37) :

51 Cri L J 907, Kamla Gangi

Jamma v. Venkatarani Reddi

(1950) AIR 1950 Mad 891 (V 37) : 51

Cri L J 931, Jambapuram Subbama

v. Jambapuram Venkata Reddi

K. M. Chhaya, for J. R. Nanavaty, for

Petitioner ; H. K. Gandhi, for K. G. Valba-

ria, for Opponent No. 1 ; J. U. Mehta, Asst

Govt. Pleader, for Opponent No. 2.

ORDER —The facts giving rise to this application in revision, broadly stated, are that the original applicant Mangalaben was married with the opponent Mansukhlal Vallabhdas on 6th April 1964 and both of them began to live as husband and wife at the house of the opponent at Khambhalia in the District of Jamnagar. The applicant Mangalaben was a resident of the village of Bed in the District of Jamnagar. For some time they pulled on quite well and thereafter she came to be ill-treated and beaten by her husband. Her case then is that on 12th September 1965 she was driven out from the house after beating her and was not even allowed to take away her clothes and ornaments etc. Since then the opponent has neglected and refused to maintain her. She has further alleged that the opponent has made very wild allegations against her character and that it has become impossible for her to live with him at his place. She, therefore, filed an application under S. 488 of the Criminal P. O., claiming maintenance at the rate of Rs. 75/- per month from him.

2 The opponent husband resisted the application inter alia contending that he has never ill-treated or beaten or driven her out from his house as alleged, and on the contrary she had gone away to her parents' place of her own accord. He further asserted that she has been in illicit intimacy with some one else at Bed and that she has even given birth to a child. Besides, he contended that since they last resided at his house at Khambhalia, the

Court at Khambhalia and not at Jamnagar has jurisdiction to try the case. In these circumstances, he said that she was not entitled to claim any maintenance from him.

3. The learned Magistrate after considering the effect of the evidence adduced by the parties in the case, found that the Court has jurisdiction to entertain and hear the application, and that the applicant was entitled to live separately from her husband on account of wild and baseless allegations against her character, though she has not been able to prove that she was ill-treated and beaten and that way deserted by her husband. In the result, he allowed maintenance at the rate of Rs. 50/- per month under S. 488 of the Criminal P. C. Feeling dissatisfied with that order passed on 13.3.1969 by Mr. U. J. Pandya, Judicial Magistrate, First Class, 4th Court Jamnagar, in Miscellaneous Application No. 16 of 1966, the opponent-husband filed Criminal Revision Application No. 16 of 1967 in the Court of the Sessions Judge at Jamnagar. The learned Sessions Judge found that the Court has jurisdiction to entertain the application, that the opponent had refused or neglected to maintain his wife—the applicant, and that the order for maintenance passed against him was proper. In the result, the application came to be dismissed. Feeling dissatisfied with that order passed on 26.9.67 by Mr. A. A. Dave, Sessions Judge, Jamnagar, the opponent has come in revision before this Court.

4. The contention in the Courts below, and faintly repeated before this Court, was that the Court of the learned Magistrate at Jamnagar had no jurisdiction to entertain the application inasmuch as the parties last resided at Khambhalia and not at Jamnagar. The Court at Khambhalia has, therefore, jurisdiction to hear the application under S. 488 of the Criminal P. C. The provisions contained in sub-s. (8) of S. 488 of the Criminal P. C. relate to the jurisdiction of the Court in which proceedings under S. 488 of the Code can be taken. It runs thus :

"Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."

The words used "in any district where he resides or is, or where he last resided with his wife" contemplate not the place but the district in which they last resided. It does not refer to 'any place' so as to give jurisdiction to the Court within which that place is situated as in this case at Khambhalia. The words "in any district where he resides or is, or where he last resided with his wife" came to

be considered in the case of Shantabai Vishnupant v. Vishnupant Atmaram Kulkarni, AIR 1965 Bom 107, and it was held as under:—

"In interpreting word 'district' in S. 488(8) of the Code, it is not only the word 'district' which one must have regard to, but the entire expression "any district where he resides." The express use of word 'district' should not be given any meaning different from normal connotation of that word and, in view of express use of words "any district where he (husband) resides," it cannot be limited only to a Court within that district within whose jurisdiction husband resides."

It appears; therefore, clear that the Magistrate stationed at Jamnagar had jurisdiction to entertain the application under S. 488 of the Criminal P. C. inasmuch as Khambhalia is in the District of Jamnagar. Even if for a moment it was assumed that such an application cannot be entertained in any such Court, by reason of S. 581 of the Criminal P. C., an order passed by any such Criminal Court cannot be set aside unless it appears that such an error has occasioned failure of justice. The order passed by any such Court is not void on the ground of having no jurisdiction. There is hardly anything to show that there has been any failure of justice on that account, and the order passed by the Court in any such application even if taken to have been filed in a wrong Court cannot therefore be set aside by this Court. That has been the settled position of law, and apart from S. 581 so saying, we have two decisions one of this Court in Ambalal Narandas Patel v. Dahiben Dahyabhai Patel, AIR 1963 Guj 91, and the other in the case of Ram Chandra Prasad v. State of Bihar, AIR 1961 S O 1629 which lay down the same thing. The finding recorded in that respect by the Court below is correct.

5. It was, however, urged by Mr. Ohhaya for the opponent that the learned Sessions Judge was wrong in observing that the learned Magistrate below had found that the applicant has established ill-treatment on the part of her husband and that he had neglected to maintain her, when in fact it is held otherwise. The learned Sessions Judge, it was urged, has, therefore, not applied his mind to that aspect of the case. It does no doubt appear true that the learned Sessions Judge has observed that "he entirely agreed with the learned Magistrate below that the wife had to stay separately because of the ill-treatment given by the husband and that the husband had failed and neglected to maintain her so far." The learned Magistrate has on the other hand found it otherwise and observed that "it was clear that so far as neglect, cruelty and ill-treatment etc. are concerned, the applicant

8. In the result therefore, there is no substance in the revision application and it is liable to be dismissed. Rule is discharged

Petition dismissed.

1970 CR L. J. 1311 (Vol. 76, C. N. 342)

(KERALA HIGH COURT)

E. K. MOIDU J.

Jacob Onden, Appellant v. Rev. Stanley Padingadan, Respondent.

Criminal Appeal No. 220 of 1969, Decided on 14 January 1970.

(A) Penal Code (1860), S. 499—Defamation—Publication of—It implies communication to at least one person other than person defamed.

Publication, implies communication to at least one person other than the person defamed. So, there can be no publication unless the subject-matter of the libel is communicated to a third person. The question whether the subject-matter had in fact been communicated to a third person is, therefore, material, for upon it depends the question of publication. (Para 8)

(B) Penal Code (1860), S. 499, Excep. 9—Defamation—Benefit of Excep. 9—Merely showing possibility of some imputations being true is not enough—Benefit of Excep. 9 of S. 499 cannot be availed.

The benefit of Excep. 9 to S. 499 cannot be availed of by showing that there is some possibility of the imputations being true. When no question of reasonable doubt as to the truth of imputations arises, the charge of defamation shall be fully established where the ingredients of S. 499, Penal Code are established beyond doubt and the accused fails to establish the truth of the imputations. (Paras 10, 11, 12)

The defence of 'fair comment' applies only to expressions of opinion or imputations on character, and not to assertion of fact. The latter can be justified only by truth. A comment cannot be fair which is built upon facts which are not truly stated. AIR 1959 Ker 100, Rel. on. (Para 12)

Cases Referred: Chronological Paras

(1959) AIR 1959 Ker 100 (V 46)=
1959 Cri L J 464, R. Sankar v.
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Emperor

14

ON/DN/B 885/70/SSG/B

K. T. Harindranath, N. V. Prabhakaran and P. Ramaranjan, for Petitioner, V. Khalid and M. A. Manhu, for Respondent.

JUDGMENT: The appeal by a private complainant before the Additional First Class Magistrate, Tellicherry is directed against the order acquitting the respondent-accused in respect of an offence under S. 500, Penal Code. The complaint was filed on 15.5.68. The complainant examined as P. W. 1, Jacob Onden is a regular and active member of the Pastorate, Tellicherry which is a unit of the Church of South India Diocese of the North Kerala. He has been working as a lay preacher in the various Pastorates within the Diocese on the invitation of the Presbyter in-charge in recognition of his character, ability and knowledge under the instruction of the head of the Diocese. He has also been chosen by the Education department of the Government of Kerala to address students of High Schools and Colleges on Psychophysical exercise, art of talking and other useful subjects of educative value. For a while he was also an active and Executive Committee member and instructor of Sree Narayana Mission Institution, Calicut. While so, he was respected and liked by a large circle of his friends and well-wishers who recognised his abilities and talents so much so they treated him with great respect and admiration.

2. The respondent Rev. Stanley Padingadan was a Pastor of the church of the South India Pastorate at Tellicherry. When he worked in that capacity there was a charge against him that he misappropriated a sum of Rs. 252.52 out of the funds of the Pastorate, but he was not prepared to settle the claim through mediation. On the other hand, he tendered his resignation which was also accepted by the Bishop. Thereafter, the respondent joined a rival group which opposed the Church of South India and made attempts to enter the churches which are directly under the church of South India and conduct services. The Christian members of the church felt aggrieved of the conduct of the respondent. However, the complainant initiated a criminal proceeding against the respondent before the Addl. First Class Magistrate, Tellicherry charging him of the defalcation of the church money. While the complaint was pending, the matter was compromised between the parties with the result the complaint was withdrawn on the respondent paying to the church the amount due to it and costs due to the complainant.

3. Thereafter, the respondent started accusing the complainant of various charges when he caused the publication of Ext. P1 news in the 'Manorama' daily D/- 20.3.69

8. In the result therefore, there is no substance in the revision application and it is liable to be dismissed. Rule is discharged. Petition dismissed.

1970 CrI. L. J. 1311 (Vol. 76, C. N. 342)

(KERALA HIGH COURT)

E. K. Moidu J.

Jacob Onden, Appellant v. Rev. Stanley Padinagan, Respondent.

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(A) Penal Code (1860), S. 499—Defamation—Publication of—It implies communication to at least one person other than person defamed.

Publication, implies communication to at least one person other than the person defamed.

So, there can be no publication unless the subject-matter of the libel is communicated to a third person. The question whether the subject-matter had in fact been communicated to a third person is, therefore, material, for upon it depends the question of publication.

(B) Penal Code (1860), S. 499, Except. 9 — Defamation — Benefit of Except. 9 — Merely showing possibility of some imputations being true is not enough—Benefit of Except. 9 of S. 499 cannot be availed.

The benefit of Except. 9 to S. 499 cannot be availed of by showing that there is some possibility of the imputations being true. When no question of reasonable doubt as to the truth of imputations arises, the charge of defamation shall be fully established where the ingredients of S. 499, Penal Code are established beyond doubt and the accused fails to establish the truth of the imputations.

(Paras 10, 11, 12)
The defence of 'fair comment' applies only to expressions of opinion or imputations on character, and not to assertion of fact. The latter can be justified only by truth. A comment cannot be fair which is built upon facts which are not truly stated. AIR 1959 Ker 100, Rel. on.

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Emperor

K. T. Harindranath, N. V. Prabhakaran and P. Ramaranjan, for Petitioner; V. Kbalid and M. A. Manbu, for Respondent.

JUDGMENT: The appeal by a private complainant before the Additional First Class Magistrate, Tellicherry is directed against the order acquitting the respondent-accused in respect of an offence under S. 500, Penal Code. The complaint was filed on 15.5.68.

The complainant examined as P. W. 1, Jacob Onden is a regular and active member of the Pastorate, Tellicherry which is a unit of the Church of South India Diocese of the North Kerala. He has been working as a lay preacher in the various Pastorates within the Diocese on the invitation of the Presbyter in-charge in recognition of his character, ability and knowledge under the instruction of the head of the Diocese. He has also been chosen by the Education department of the Government of Kerala to address students of High Schools and Colleges on Psychological subjects of educational value. For a while he was also an active and Executive Committee member and instructor of Free Maryana Mission Institution, Calicut. While so, he was respected and liked by a large circle of his friends and well-wishers who recognised his abilities and talents so much so they treated him with great respect and admiration.

2. The respondent Rev. Stanley Pandian was a Pastor of the church of the South India Pastorate at Tellicherry. When he worked in that capacity there was a charge against him that he misappropriated a sum of Rs. 252.52 out of the funds of the Pastorate, but he was not prepared to settle the claim through mediation. On the other hand, he tendered his resignation which was also accepted by the Bishop. Thereafter, the respondent joined a rival group which opposed the Church of South India and made attempts to enter the churches which are directly under the church of South India and conduct services. The Christian members of the church felt aggrieved of the conduct of the respondent. However, the complainant initiated a criminal proceeding against the respondent before the Addl. First Class Magistrate, Tellicherry charging him of the defalcation of the church money. While the complaint was pending, the matter was compromised between the parties with the respondent paying to the church the amount due to it and costs due to the complainant.

3. Thereafter, the respondent started accusing the complainant of various charges when he caused the publication of Ext. P1 news in the 'Manorama' daily D/- 20.3.69

reason to refuse to live with him, and in case he fails or neglects to maintain her even though living separately from him, she can claim maintenance under S. 489, Criminal P. C.

7. Now, the applicant-wife, who had been alleged such wild and lascivious conduct, it was impossible for her to maintain her moral character and had made an additional ground that in those circumstances it was impossible for her to become pregnant out of illicit relations with him. The allegations about her conduct were more mere allegations and no substance. She gave birth to a child of her husband on 12-9-1965. The child was thus within a period of months and no adverse inference was possible to be raised by reason of S. 112, Indian Evidence Act. In other words, she was living with her husband before she went to her parents' place on 12-9-1965 and unless it was shown otherwise, the child born of her can be said to have been the child by the husband. Opponent in the case. Be it said here, that these allegations were made in the correspondence that went on between the parties and they continued to be persisted by him not only in the written statement but even at the time when the evidence came to be recorded by the Court. He never felt sorry about having made any such allegations against his wife. They are found to be false and utterly baseless and there is no reason for this Court to hold otherwise in the circumstances of this case. In the case of Kamala Gangabai v. Venkatarani Reddi, AIR 1950 Mad 885, it was held that deliberate attribution of immorality falsely to a wife will certainly fall under the definition of legal cruelty and entitle a wife to live separately from such a husband and claim separate maintenance. To the same effect is the decision in the case of Jamabpuram Subbamma v. Jamabpuram Venkata Reddi, AIR 1950 Mad 394, where it was held that where a person states that a son born to his wife while she still remained his wife was not born of him, at the same time not proving the impossibility of his access to her, he must be taken to have deliberately attributed immorality falsely to his wife and the latter is entitled to live separately and claim maintenance from the husband. It was further held that the presumption under S. 112 should be drawn by all Courts, civil, criminal and revenue, governed by the Evidence Act. On that ground, it can be easily said that she was entitled to live separately from her husband and since he failed to provide for her maintenance for any justifiable cause, she was entitled to claim the same under S. 488, Criminal P. C.

"The applicant failed to make out her case." The applicant's case was that she was being ill-treated and beaten and ultimately driven out from her house by the husband on 12-9-1965. That part of the version of the applicant-wife has been disbelieved by the learned Magistrate and consequently the observations made by the learned Sessions Judge do not appear to be so correct in that regard. We shall, therefore, ignore that finding of the learned Sessions Judge and proceed on the basis of the findings recorded by the learned Magistrate.

6. It was, however, urged by Mr. Chhaya that once it was found that she was not ill-treated and driven out to an extent as to amount to neglect or refusal to maintain her as contemplated under S. 113 (1) of the Code, on other consideration, there was hardly any justification to ask or direct the husband to pay any amount of maintenance as directed in this case. What is contemplated in S. 113 (1) is that there must be "neglect or refusal to maintain his wife, he having sufficient means" to do the same. "Neglect or refusal to maintain" used in this section are wide enough to cover any justifiable cause established by the applicant-wife to live separate from her husband, as is pointed out by the learned Magistrate, though not dealt with by the learned Sessions Judge in his judgment. Now it appears that the defence of the opponent was that she was in illicit intimacy with someone else at the village of Bod and that a child born of her was said to be living with someone. Thus she was said to be living in adultery and consequently she was not entitled to claim any maintenance whatever by reason of sub-s. (f) of S. 113 of the Criminal P. C. That sub-s. (f) runs thus:

"No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

In this regard, the learned Magistrate has discussed the evidence and found on proper appreciation thereof that these allegations are quite baseless and in no way established. The husband cannot, therefore, disown his inability to maintain her on that ground. It is true that she must show that she had sufficient reason to refuse to live with her husband as contemplated in this sub-s. (f). Now it is the contention of the learned advocate for the applicant that when such reckless allegations of her adulterous behaviour are made by her husband against his wife, she has every right to refuse to live with him. They amount to legal cruelty so as to be tantamount to saying that she had sufficient

has failed to make out her case." The applicant's case was that she was being ill-treated and beaten and ultimately driven out from his house by the husband on 12.9.1965. That part of the version of the applicant-wife has been disbelieved by the learned Magistrate and consequently the observations made by the learned Sessions Judge do not appear to be so correct in that regard. We shall, therefore, ignore that finding of the learned Sessions Judge and proceed on the basis of the findings recorded by the learned Magistrate.

6. It was, however, urged by Mr. Chhaya that once it was found that she was not ill-treated and driven out to an extent as to amount to neglect or refusal to maintain her as contemplated under S. 488 (1) of the Code, on other considerations there was hardly any justification to ask or direct the husband to pay any amount of maintenance as directed in this case. What is contemplated in S. 488 (1) is that there must be "neglect or refusal to maintain his wife, he having sufficient means" to do the same. "Neglect or refusal to maintain" used in this section are wide enough to cover any justifiable cause established by the applicant-wife to live separate from her husband, as is pointed out by the learned Magistrate, though not dealt with by the learned Sessions Judge in his judgment. Now it appears that the defence of the opponent was that she was in illicit intimacy with someone else at the village of Bed and that a child born of her was not through him but by someone. Thus she was said to be living in adultery and consequently she was not entitled to claim any maintenance whatever by reason of sub.s. (4) of S. 488 of the Criminal P. C. That sub.s. (1) runs thus:

"No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

In this regard, the learned Magistrate has discussed the evidence and found on proper appreciation thereof that these allegations are quite baseless and in no way established. The husband cannot, therefore, disown his liability to maintain her on that ground. It is true that she must also show that she had sufficient reason to refuse to live with her husband as contemplated in this sub.s. (4). Now it is the contention of the learned advocate for the applicant that when such reckless allegations of her adulterous behaviour are made by her husband against his wife, she has every right to refuse to live with him. They amount to legal cruelty so as to be tantamount to saying that she had sufficient

reason to refuse to live with him, and in case he fails or neglects to maintain her even though living separately from him, she can claim maintenance under S. 488, Criminal P. C.

7. Now, the applicant-wife had strongly resented such wild and baseless allegations affecting her moral character and had made it an additional ground that in those circumstances it was impossible for her to live with him. The allegations about her having become pregnant out of illicit relations with someone else were mere allegations and had no substance. She gave birth to a child on 6.5.1966. Admittedly she had left the house of her husband on 12.9.1965. The birth of child was thus within a period of a few months and no adverse inference was possible to be raised by reason of S. 112, Indian Evidence Act. In other words, she was living with her husband before she went to her parents' place on 12.9.1965 and unless it was shown otherwise, the child born of her can be said to have been the child by the husband-opponent in the case. Be it said here, that these allegations were made in the correspondence that went on between the parties and they continued to be persisted by him not only in the written statement but even at the time when the evidence came to be recorded by the Court. He never felt sorry about having made any such allegations against his wife. They are found to be false and utterly baseless and there is no reason for this Court to hold otherwise in the circumstances of this case. In the case of Kamala Gangalamma v. Venkatarami Reddi, AIR 1950 Mad 885, it was held that deliberate attribution of immorality falsely to a wife will certainly fall under the definition of legal cruelty and entitle a wife to live separately from such a husband and claim separate maintenance. To the same effect is the decision in the case of Jambapuram Subbama v. Jambapuram Venkata Reddi, AIR 1950 Mad 394, where it was held that where a person states that a son born to his wife while she still remained his wife was not born of him, at the same time not proving the impossibility of his access to her, he must be taken to have deliberately attributed immorality falsely to his wife and the latter is entitled to live separately and claim maintenance from the husband. It was further held that the presumption under S. 112 should be drawn by all Courts, civil, criminal and revenue, governed by the Evidence Act. On that ground, it can be easily said that she was entitled to live separately from her husband and since he failed to provide for her maintenance for any justifiable cause, she was entitled to claim the same under S. 488, Criminal P. C.

8. In the result therefore, there is no substance in the revision application and it is liable to be dismissed. Rule is discharged

Petition dismissed.

1970 CRI. L. J. 1311 (Vol. 76, C. N. 342)

(KERALA HIGH COURT)

E. K. MOIDU J.

Jacob Onden, Appellant v. Rev. Stanley Padingadan, Respondent.

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(A) Penal Code (1860), S. 499—Defamation—Publication of—It implies communication to at least one person other than person defamed.

Publication, implies communication to at least one person other than the person defamed. So, there can be no publication unless the subject-matter of the libel is communicated to a third person. The question whether the subject-matter had in fact been communicated to a third person is, therefore, material, for upon it depends the question of publication. (Para 8)

(B) Penal Code (1860), S. 499, Excep. 9—Defamation — Benefit of Excep. 9 — Merely showing possibility of some imputations being true is not enough—Benefit of Excep. 9 of S. 499 cannot be availed.

The benefit of Excep. 9 to S. 499 cannot be availed of by showing that there is some possibility of the imputations being true. When no question of reasonable doubt as to the truth of imputations arises, the charge of defamation shall be fully established where the ingredients of S. 499, Penal Code are established beyond doubt and the accused fails to establish the truth of the imputations.

(Paras 10, 11, 12)

The defence of 'fair comment' applies only to expressions of opinion or imputations on character, and not to assertion of fact. The latter can be justified only by truth. A comment cannot be fair which is built upon facts which are not truly stated. AIR 1959 Ker 100, Rel. on. (Para 12)

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CN/DN/B 985/70/SSG/B

K. T. Harindranath, N. V. Prabhakaran and P. Ramaranjan, for Petitioner, V. Khalid and M. A. Manbu, for Respondent.

JUDGMENT: The appeal by a private complainant before the Additional First Class Magistrate, Tellicherry is directed against the order acquitting the respondent-accused in respect of an offence under S. 500, Penal Code. The complaint was filed on 15.5.68. The complainant examined as P. W. 1, Jacob Onden is a regular and active member of the Pastorate, Tellicherry which is a unit of the Church of South India Diocese of the North Kerala. He has been working as a lay preacher in the various Pastorates within the Diocese on the invitation of the Presbyter in-charge in recognition of his character, ability and knowledge under the instruction of the head of the Diocese. He has also been chosen by the Education department of the Government of Kerala to address students of High Schools and Colleges on Psychophysical exercise, art of talking and other useful subjects of educative value. For a while he was also an active and Executive Committee member and instructor of Sree Narayana Mission Institution, Calicut. While so, he was respected and liked by a large circle of his friends and well-wishers who recognised his abilities and talents so much so they treated him with great respect and admiration.

2. The respondent Rev. Stanley Padingadan was a Pastor of the church of the South India Pastorate at Tellicherry. When he worked in that capacity there was a charge against him that he misappropriated a sum of Rs. 252.52 out of the funds of the Pastorate, but he was not prepared to settle the claim through mediation. On the other hand, he tendered his resignation which was also accepted by the Bishop. Thereafter, the respondent joined a rival group which opposed the Church of South India and made attempts to enter the churches which are directly under the church of South India and conduct services. The Christian members of the church felt aggrieved of the conduct of the respondent. However, the complainant initiated a criminal proceeding against the respondent before the Addl. First Class Magistrate, Tellicherry charging him of the defalcation of the church money. While the complaint was pending, the matter was compromised between the parties with the result the complaint was withdrawn on the respondent paying to the church the amount due to it and costs due to the complainant.

3. Thereafter, the respondent started accusing the complainant of various charges when he caused the publication of Ext. P1 news in the 'Manorama' daily D/- 20.3.69

bringing to the notice of the public that the criminal complaint against the respondent was withdrawn on condition of the payment of money due to the church and to himself. The respondent then published Ext. P2 D/ 31.3.68 in the same paper denying that the withdrawal was conditional on payment of money, but it was an unconditional withdrawal. In answer to that publication, the complainant issued a printed leaflet Ext. P3 D/ 6.4.68 setting forth all the circumstances under which the case was withdrawn. Of course, the appellant-complainant made certain other allegations also against the respondent. It was in answer to that printed leaflet that the disputed pamphlet in question Ext. P1 D/ 27.4.68 was published by the respondent against the appellant. The relevant portion of Ext. P1 pertaining to the imputation directed against the appellant is read as follows:

"A modern mercenary messiah who blows his pipe according as he is paid One who has no qualms about blurting out whatever comes to his tongue, a cur that attacks all and sundry. This glutton whose sole aim in life is filling his stomach is a dog that barks for any master who feeds it. Thus Onden has neither status in society nor self respect. The Bishop conferred many honours on Onden and gave him financial and other help as a reward for acting according to his (the Bishop's) wishes. (This cur) filled its stomach for a time remaining in the Christian fold. Then it thought the feed would be better in the Arya Samaj and joined it. As the fare there was not good the cur jumped back to the Christian camp. Riff raff. An anti-social being that divides and destroys"

4. In support of the complaint, the appellant has been examined as P. W. 1 and he has chosen to examine 4 other witnesses as P. Ws. 2 to 5. The respondent, however, did not examine any witnesses. The evidence of P. W. 1 is that he has been defamed by the publication of Ext. P4 and that on account of the publication his name has been lowered in the estimate of his friends and well-wishers. Ext. P4, according to him, has been published by the respondent and he distributed the copies thereof to various persons. P. W. 2, who is a well-wisher of the appellant belonging to Chova, which is within the jurisdiction of the Court below, was a neighbour of the respondent. He stated that Ext. P4 was published by the respondent. A brother of his brother-in-law produced a copy of Ext. P4 to be handed over to him and he, in his turn, handed over a copy of Ext. P4 to P. W. 1. P. W. 5 stated that he handed over a copy of Ext. P4 to P. W. 2 when he got 10 to 18 copies of the same from the respondent

himself on the advice that he should distribute them among his friends. P. W. 3 is the Managing Director of one Associated Timbers Ltd. He stated that he read Ext. P4 when a copy was given to him by P. W. 1. He is a resident in Vedikkakom, Tellicherry within the jurisdiction of the Court below. P. W. 4 is a resident of Chova. He stated that he got a copy of Ext. P4 from the respondent. P. Ws. 1 to 5 had made statements that on account of the publication of Ext. P4, the name of the appellant had been lowered in the estimate of his friends and well-wishers. It may also be noted that P. Ws. 2 to 4 had not been cross-examined by the respondent's Advocate.

5. When the respondent was questioned by the lower Court under S. 312, Criminal P.C., he stated that he published Ext. P4 and that it was published for the protection of his own interest. He further stated that all the averments in Ext. P4 are correct. However, he pleaded that he was not guilty.

6. The Court below found that there had not been due publication of Ext. P4 and even if there was publication the respondent is protected in his own interest to make the publication and that he being protected under Exception 9 of S. 499, Penal Code was not guilty of any offence.

7. The first point we have to consider is whether Ext. P4 per se is defamatory or not. There is a personal attack directed against the appellant in Ext. P4. He has been described as a mercenary messiah who blows his pipe according as he is paid. He has been mentioned as a person who had neither status in society nor self respect. It is also stated that he filled his stomach for a time remaining in the Christian fold and then he thought that the feed would be better in the Arya Samaj and joined it. He is described as a riff raff and an anti social being that divides and destroys. He is further described as a glutton who saw his life to fill his stomach as a dog that barks for any master who feeds it. I am sure that these words will constitute imputations concerning the appellant intending to harm his reputation in the estimation of others. These words are likely to lower the moral or intellectual character of the appellant or his calling. The position of the appellant was that of a lay preacher in the various Pastorates under the North Kerala Diocese of the Church of South India. The evidence of P. Ws. 2 to 4 is that the appellant was held in high esteem and that on account of the publication his name has been lowered in the estimate of the various members of the Christian community in North Kerala as well as among his friends and well-wishers. I have, therefore, no hesitation in seeing that these

words per se are defamatory, which would harm the reputation of the appellant.

8. With regard to the publication, the court below seems to have taken an extraordinary view that the publication should be in some form of advertisement of the allegations by the respondent against the appellant. It is not necessary for such publication to be made within the provision of S. 499, Penal Code. Publication, according to that Section, implies communication to at least one person other than the person defamed. So, there can be no publication unless the subject-matter of the libel is communicated to a third person. The question whether the subject-matter had in fact been communicated to a third person is, therefore, material, for upon it depends the question of publication. In this regard, the evidence of P. Ws. 1 to 5 may be seen. They have given evidence that everyone of them came into possession of the copies of Ext. P4 and that P. Ws. 2 to 5 had either communicated the contents thereof to P. W. 1 or others and P. W. 5 himself had received 10 to 18 copies of the same from the respondent for distribution among his friends. P. W. 5 complied with the request of the respondent by distributing them. P. Ws. 2 to 4 had not been even cross-examined by the respondent's Advocate. Under these circumstances, I find that there had been publication within the meaning of S. 499, Penal Code.

9. The question as to jurisdiction whether the court below had the right to entertain the complaint within its file was not directly raised by the respondent. But, there was no question of lack of jurisdiction in this case. There is the evidence of P. Ws. 1, 2, 3 and 5 that the publication was within the jurisdiction of the court of the District Magistrate, Tellicherry in which the complaint was filed. P. W. 2 is a resident of Chova. P. W. 3 was a resident of Tellicherry town. P. W. 5 lived in the mission compound, Chova. P. W. 5 received the copies within the jurisdiction of the lower court. So, the publication of Ext. P4 was made within the territorial limits of the court below and as such the court below had jurisdiction to entertain the complaint.

10. The next question is whether the appellant is protected under Exception 9 of S. 499, Penal Code. Exception 9 reads as follows :

"It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good."

On a reading of the illustrations under that exception it was clear that the instant case did not come within the exception. Under this

exception it is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it or for the public good. There is an imputation in Ext. P4 that the appellant joined the Arya Samaj. That is an assertion of fact which has to be proved by the respondent to establish that the imputation is true. When the benefit of the first Exception can be availed of only when the imputations are true, it cannot be open to the respondent to say that he should be given the benefit of that Exception even when he is merely able to show that there is some possibility of the imputations being true. In this case there is not even a suggestion that it is true.

11. That the comment that the appellant joined the Arya Samaj which believed and practised conversion of all other communities and religious adherents to its fold is per se defamatory of the appellant who professes to be a true Christian. The respondent did not prove that he comes within the exception so far as that part of the comment is concerned. When no question of reasonable doubt as to the truth of imputations arises, the charge of defamation shall be fully established where the ingredients of S. 499, Penal Code are established beyond doubt and the respondent fails to establish the truth of the imputations.

12. The test of exception 9 is that the imputation on the character of another should be made in good faith and for the protection of the interest of the person making it or of any other person or for the public good. What would amount to fair comment has been considered by a Bench of the Kerala High Court in the case *R. Sankar v. State*, AIR 1959 Ker 100 wherein Raman Nayar J., (as he then was) speaking for the Bench stated :

"A mere perusal of Exceptions 2, 3 and 9 is sufficient to show that these exceptions which embody the defence compendiously known as 'fair comment' apply only to expressions of opinion or imputations on character, and not to assertion of fact. The latter can be justified only by truth. Comment must be on actual and not on imagined conduct, and even if the accused person genuinely believed the imputed conduct to be real that would be no defence. If the opinion or the imputation purports to be based on facts, then the person claiming the benefit of these exceptions must prove those facts. It is not enough for him to say that he believed those facts. When the allegations of fact are as in the present case in themselves defamatory and those allegations are not proved to be true no defence of fair comment can possibly arise. For, 'fair comment' cannot justify a defamatory statement.

which is untrue in fact. "A comment cannot be fair which is built upon facts which are not truly stated."

13. Apart from that, the respondent is not able to point out as to how he was justified in making the comment to protect his own interest. It would be open to him to criticise the appellant regarding his conduct for filing an alleged false complaint against him. It would be open to him to criticise that as a lay preacher the appellant did not perform his duties for the good of the public. Nothing of the kind was commented upon in Ext. P.1. On the other hand, the respondent lost his balance and made comments upon the appellant's conduct in a callous manner without any justification.

14. It is contended on behalf of the respondent that the appellant's conduct in publishing Ext. P.3 leaflet was not beyond board and therefore Ext. P.4 publication shall be deemed to be one which the respondent was privileged to make in his own interest. In *Ram Narain v. King-Emperor*, AIR 1924 All 566 a person published a pamphlet defaming another by describing him as, "a sharif badmash" which when translated into English meant the "gentleman scoundrel." It was contended that it has not lowered the moral or intellectual character of the person and no offence was committed. But, Daniels J., stated.

"This argument overlooks the fact that a person commits defamation within the meaning of S 499, who publishes any imputation concerning any person intending to harm the reputation of that person whether harm is actually caused or not. A person who publishes defamatory matter against another in a case not covered by any of the exceptions cannot escape punishment on the ground that the reputation of the person attacked was so good or that of the persons attacking so bad, that serious injury to the reputation was not in fact caused."

15. The above observation exactly fits in with the case on hand. On the facts and circumstances of the case, I am of the opinion that the words in question are per se defamatory which is sufficient to harm the reputation of the appellant, that it had its due publication and that it did not come in any of the exceptions contemplated under S. 499, Penal Code. So, the Court below was not correct in acquitting the respondent. I find the respondent guilty of the offence under S. 500, Penal Code, imposition of a fine of Rs. 100/- will meet the ends of justice in this case.

16. In the result, the appeal is allowed; the order of acquittal is set aside, the respondent accused is convicted and sentenced to pay a fine of Rs. 100/-, in default to undergo simple

imprisonment for one month under S. 500, Penal Code. Time for payment of fine one month from this date.

Appeal allowed.

1970 CRI. L. J. 1314 (Vol. 76, C. M. al. 353)
(KERALA HIGH COURT)

L. K. MOIDU, J.

State of Kerala, Appellant v. P. K. Rajan Respondent.

Criminal Appeal No. 818 of 1968 is an, D
20-1-1970.

Prevention of Food Adulteration (1954), S. 10 (7) — Powers of Food inspectors—Compliance with provisions.

Some Ice candy was purchased by the Food Inspector from the accused who also issued a voucher containing his signature. Form No 6 notice was also acknowledged by him. The Mahazar was attested by accused as also two independent witnesses. The answer of the accused to the question put under S. 342, Criminal P. C. was that he had nothing to say. There was also evidence of the peon to corroborate the evidence of the Food Inspector.

Held, that there was compliance with the provisions of S. 10 (7) and the prosecution had proved beyond a reasonable doubt that the sale of Ice candy by the accused to the Food Inspector was true. 1968 Cri L J 683 (Ker) and 1967 Cri L J 1430 (Ker), Rel. on. (Paras 4, 7)

Cases Referred: Chronological Paras
(1968) 1968 Cri L J 683 = 1967 Ker
L T 825, Food Inspector, Calicut
Corpn. v. Padmanabhan Nair 5
(1967) 1967 Cri L J 1430 = 1967 Ker
L T 290, T. A. Ouseph v. State of
Kerala 6.

State Prosecutor, for Appellant, O. K. S. Panicker and T. A. Narayanan Nair, for Respondent

JUDGMENT. — This appeal by the State is against the acquittal of the 1st accused in O. C. 20/69 by the District Magistrate (Judicial), Kottayam, in respect of an offence under Ss. 7 (1) and 16 (1) (a) (i) of the Prevention of Food Adulteration Act, 1954 (Act 37 of 1954).

2. On the morning of 12-12-68 at about 10.30 a.m. the predecessor of P. W. 1, Food Inspector, Kumarakam Panchayat, one deceased Itticheriya, went to the Kumarakam market accompanied by his peon, P. W. 2, Rajappan when they intercepted adulterated Ice candy which was being carried by the 1st accused-respondent for sale in an

Ice box within the market, out of which Itticheriya purchased 30 Ice candy sticks worth Rs. 1-50 from the respondent and in token of the receipt of the amount the respondent issued Ext. P-3 receipt. Then Ext. P-1; Form No. 6 notice was issued by the Food Inspector to the respondent, which was also acknowledged by him. The sample taken by the Food Inspector was divided into 3 parts and they were separately bottled and sealed on application of the requisite preservative. One such sample was given to the respondent and each of the remaining two samples were sent, one to the Court and the other to the Public Analyst. Ext. P-2 is the mahazar prepared by the Food Inspector as required by Ss. 10 and 11 of the Act referred to above. Ext. P-2 mahazar was not only signed by the respondent, but also by two witnesses, who are examined as P. W. 3, Aniyar and P. W. 4, Narayanan. The Public Analyst on examination of the sample found that it contained artificial sweeteners, saccharin and dulcin and is therefore adulterated, and that the use of dulcin in food is not permitted on account of the fact that its consumption is injurious to public health. He also found that no decomposition had taken place in the sample, that would interfere with the analysis. Ext. P-5 is the report by the Public Analyst. On receipt of the report, P. W. 1, the present Food Inspector of the Panchayat, laid the charge against the respondent as well as the 2nd accused, who was found to be the owner of the Ice candy which was sent for sale through the respondent. The respondent had nothing to say as against the evidence adduced against him when he was questioned under S. 342, Criminal P. C. however, the 2nd accused was discharged by the Court below.

3. The lower Court on an examination of the evidence found that the prosecution did not comply with the provisions of S. 10 (7) of the Act and therefore the prosecution is not sustainable thereby the respondent was acquitted. The appeal is against that acquittal.

4. The evidence of P. W. 1, the present Food Inspector of the Panchayat, is that the provisions of the Act had been complied with in the instant case. There is also the evidence of P. W. 2 to corroborate the evidence of P. W. 1 in the same manner. But, P. W. 3 turned hostile and P. W. 4 in his cross-examination did not support the prosecution that he saw the purchase of the Ice candy from the respondent. However, there is the evidence of P. Ws. 1 and 2 to prove the purchase. The former Food Inspector died after the incident and therefore P. W. 1 the successor-in-office, had been examined. The learned counsel of the respondent disputes

the fact that there was sufficient evidence to establish that the purchase of Ice candy from the respondent was true. This depends upon the appreciation of the evidence in the case. It would appear from the reasoning of the learned District Magistrate that the evidence of P. W. 2 was not sufficient to prove the purchase. In this regard certain clinching circumstances may be seen. It is proved that Ext. P-3 is a voucher which was issued by the respondent himself to the Food Inspector. It contained the left hand thumb impression of the respondent as well as his signature. Ext. P-1, Form No. 6 notice, had also been acknowledged by the respondent. Similarly, the mahazar, Ext. P-2, was not only attested by the respondent, but also by P. Ws. 3 and 4. P. Ws. 3 and 4 admit that they signed the mahazar Ext. P-2, but they denied having seen the purchase. When Exts. P-1 to P-3 were put to the respondent under S. 342, Criminal P. C., his answer was that he had nothing to say about them. The evidence of P. W. 2 is conclusive on Exts. P-2 & P-3. The evidence of P. Ws. 2 to 4 read with the statement of the respondent revealed that the purchase of the Ice candy from the respondent was true. There was, therefore, no reason to think that the prosecution would have launched a false case against the respondent. There is sufficient evidence to connect the respondent to the incident. I find, disagreeing with the learned District Magistrate, that the prosecution has proved its case beyond a reasonable doubt that the sale of Ice candy by the respondent to the Food Inspector at 10.30 a.m. on 12-12-68 was true.

5. It would appear from the judgment of the lower Court that the acquittal of the respondent was based on the sole ground that there had not been the compliance of the provisions of S. 10 (7) of the Act. Section 10 (7) reads as follows:

"A Food Inspector shall have power —

(a) to take samples of any article of food from —

(i) any person selling such article;

... ..

(7) Where the Food Inspector takes any action under cl. (a) of sub-s. (1), sub-s. (2), sub-s. (4), or sub-s. (6), he shall x x (call one or more persons to be present at the time when such action is taken and take his or their signatures)."

This sub-section requires that the Food Inspector shall call one or more persons to be present at the time when action is taken and take his or their signatures. This sub-section came up for consideration in many decisions of this Court, the last of which was in Food Inspector, Calicut Corporation v. Padmanabhan

Nair, 1967 Ker L T 825 : (1968 Cri L J 688) (DB). The observation in that case is as follows:

"The object of calling persons to be present at the time when action is taken by Food Inspector under the section is to ensure the regularity and to secure evidence of the action of the Food Inspector. The requirement of calling persons to witness the action of the Food Inspector is to assure fairness in the action and therefore, the persons called must be independent. It is not possible to lay down any hard and fast rule as to what class of persons will be independent. It is difficult to characterise all persons belonging to or connected with trade in articles of food as dependents or under the influence of the Food Inspector. Because an independent person of the nature envisaged has not been present at the time of the action of the Food Inspector the proceedings of the Food Inspector relating to the purchase and sampling would not be invalid. If in a case it is possible to come to the conclusion on the evidence adduced that the action of the Food Inspector has been regular, the fact that the person or persons present to witness the action of the Food Inspector is or are not independent will not be fatal to the prosecution. If no independent witness has been called to be present on the occasion of the action of the Food Inspector, the only consequence will be that the Court will have to look into the evidence in the case with greater care."

6. It is clear, in the circumstances of this case, that independent witnesses had been called to witness the action by the Food Inspector. P. Ws. 3 and 4 are independent witnesses. In that way, the requirements of the section have been complied with. But, the only consequence will be to see whether the evidence in a particular case will be sufficient to bring home the guilt of the accused beyond a reasonable doubt which depends upon the evidence and other circumstances of each case. That appears to be the view expressed by Isaac, J., in *T. A. Ouseph v. State of Kerala*, 1967 Ker L T 290 : (1967 Cri L J 1430). The opinion has been expressed in the following words:

"The question whether non-compliance of the statutory procedure would cause prejudice or occasion failure of justice within the meaning of S. 537 of Criminal P. C., depends on the facts and circumstances of each case. The non-compliance of S. 10 (7) does not vitiate the action taken by the Food Inspector, but it only makes the evidence relating to the action taken by him liable to a more careful scrutiny by the Court. To construe "persons" as "independent witnesses" is not to import

something entirely alien to the spirit of the section. The very idea behind requiring other persons to witness the action of the investigating officer, is the need for corroborating his evidence and his official subordinates are certainly not the best persons to serve that purpose. But there is no presumption that every person of that category is susceptible to the influence of the prosecutor. The question in final analysis is one of reliability of the evidence and not its admissibility. The view that persons connected with trade in articles of food would not be independent witnesses is not a general proposition of law."

7. It is clear from the above two decisions that even the question whether non-compliance or occasion failure of justice depends on the facts and circumstances of each case. Read in that light, the facts in the instant case would reveal that the purchase of candy by the Food Inspector from the respondent is sufficiently proved by the evidence of P. W. 2 read in the light of the documentary evidence, Exts P.1 to P.8, the genuineness of which cannot be disputed in the circumstances of the case. The learned District Magistrate's finding that the requirement of S. 10 (7) is not complied with is not correct. The acquittal order has, therefore to be set aside. The District Magistrate will proceed with the trial in the light of the evidence already on record.

8. In the result, the acquittal order passed by the District Magistrate (Judicial), Kottayam, is set aside and the case is remanded to the District Magistrate for disposal in accordance with law on the basis of the evidence on hand, subject to the finding in this appeal.

Case remanded.

1970 CRI.-L. J. 1316 (Vol. 76, C. N. 344)

(MADRAS HIGH COURT)

K. N. MUDALIYAR J.

In re Kasthurirangam and others, Petitioners.

Criminal Reyn. Case No 146 of 1969, D/- 21.1.1970, against order of Sessions Court, Thanjavur in C. A. No. 87 of 1968.

Penal Code (1860), S. 147 — Rioting — Punishment for — Accused member of unlawful assembly — Overt acts alleged against him not proved — No automatic acquittal under this section where overt acts by others in common intention proved — AIR 1965 S C 202 and AIR 1969 S C 689, Rel. on; AIR 1956 S C 181 and AIR 1949 Mad 22 and AIR 1954 Mad 785, Dist. (Para 3)

DN/EN/B757/70/MNT/B

Cases Referred: Chronological Paras

(1969) AIR 1969 S C 689 (V 56) =
1969 Mad L J (Cri) 482 = 1969 Ori
L J 1061, Ramu Gope v. State of
Bihar.

(1965) AIR 1965 S C 202 (V 52) =
1965 (1) Ori L J 226, Masalti v.
State of U. P.

(1956) AIR 1956 S C 181 (V 43) =
1956 Cri L J 345, Baladdin v. State
of U. P.

(1954) AIR 1954 Mad 785 (V 41) =
1954 (1) Mad W N (Cri) 28 = 1954 Cri
L J 1254, Sambandam v. State

(1949) AIR 1949 Mad 22 (V 36) =
1948 Mad W N (Cri) 144 = 50 Cri
L J 93, Veeriah v. King

V. Venkataraman, for Petitioners; Addl.
Public Prosecutor, for State.

ORDER.—A-1 to A-13 and A-15 are the peti-
tioners. The entire occurrence was a sequel to
an agrarian dispute. The facts and findings are
elaborately set down in the judgments of the
two Courts below. In the circumstances of the
case, and on the facts proved, the learned
counsel was unable to question the correctness
or the propriety of the convictions of A-1
to A-8.

2. The learned counsel placed reliance on
the finding of the learned Assistant Sessions
Judge, in paragraph 14 of his judgment :

"The circumstances mentioned reveal that
the prosecution has improved the case so far
as the complicity of A-9 to A-13 and A-15 is
concerned and specific overt acts have been
attributed to them only subsequently. The
fact that P. W. 1 had stated in Ex. P. 1 and
subsequently reiterated before the Committing
Magistrate, that some unknown persons also
beat him and when P. W. 1 is unable to men-
tion on which parts of the body, persons other
than the accused beat him, it is doubtful.
Whether the specific overt acts now attributed
to A-9 to A-13 and A-15 can be true. Since
the benefit of every reasonable doubt must
be given to the accused, I am satisfied, that
A-9 to A-13 and A-15 cannot be held to be
guilty of having caused hurt to P. W. 1 or
having committed the specific acts attributed
to them by P. W. 1 in evidence."

and argued that inasmuch as specific overt
acts have been disbelieved by the trial Judge,
the very presence of these accused, A-9 to
A-13 and A-15 at the scene of the occurrence,
must be doubted. I am unable to accept this
argument. The learned trial Judge has suc-
cinctly given the finding as follows.

"As regards the other accused (A-9 to A-13
and A-15) the evidence on record makes it
clear, that while A-1 to A-8 had individually
played specific parts, A-9 to A-13 and A-15

were only members of the unlawful assembly
which had the common object of beating
P. Ws. 1 to 3 and causing hurt to them."

The counsel did not argue that the names of
A-9 to A-13 and A-15 were not mentioned in
Ex. P.1. There is only a general statement
that these accused, along with the others, beat
P. Ws. 1 to 3. It is true that no specific overt
acts have been mentioned in detail in Ex. P-1
and therefore the proof of specific overt acts
against these accused did not command any
acceptance by the trial Judge.

3. The argument of Mr. Venkataraman
would boil itself down to this. The prosecu-
tion charges A, B, C, D and E with specific
overt acts and when it fails to prove them,
there must be a mechanical or automatic
acquittal under S. 147, I. P. C. I do not
accept this argument for the simple reason
that the terms of S. 146, I. P. C. would make
it clear that when force or violence is used by
an unlawful assembly or by any member
thereof, in prosecution of the common object
of such assembly, every member of such
assembly is guilty of the offence of "rioting."
The finding that A-1 to A-8 had used "force or
violence" against P. Ws. 1 to 3 and have been
convicted properly for certain specific offences
would render the other members of the unlaw-
ful assembly who shared the common object
of such assembly, undoubtedly guilty of the
offence under S. 147, I. P. C.

4. In support of his argument, Mr. Venkata-
raman cited Baladdin v. State of U. P., AIR
1956 S C 181, Veeriah v. King, 1948 Mad W N
(Cri) 144 (1) = (A I R 1949 Mad 22) and
Sambandam v. State, 1954 Mad W N (Cri)
28 = (A I R 1954 Mad 785). I really derive no
support for the validity of such an argument
from the rulings cited above. For the view
expressed by me on the guilt of A-9 to A-13
and A-15, for an offence under S. 147, I. P. C.
I derive considerable support from the deci-
sions reported in Masalti v. State of U. P.,
A I R 1965 S C 202, Ramu Gope v. State of
Bihar, 1969 Mad L J (Cri) 482 = (A I R 1969
S C 689). In the light of the reasoning in the
judgment reported in 1969 Mad L J (Cri) 482
= (A I R 1969 S C 689) it is impossible for me
to accept the argument of Mr. Venkataraman.

5. Nor that I have held that the convictions
of A-9 to A-13 and A-15 under S. 147, I. P. C.
are proper, it follows automatically that the
constructive liability of these petitioners for
the acts of A-1 to A-8 is also proved.

6. Mr. Venkataraman appealed for the
clemency of the Court in regard to the sen-
tence of imprisonment awarded against A-9 to
A-13 and A-15. Inasmuch as they were ac-
quitted of the specific overt acts attributed by
P. Ws. 1 to 3, I take that circumstance into

condemnation and reduce the sentence of imprisonment on them to 'six months' rigorous imprisonment both under S. 147, I. P. C. and also under S. 149, I. P. C. read with the relevant part section. All the sentences imposed on them will run concurrently.

7. I see no grounds to interfere with the convictions and sentences on A.1 to A.8. With the above modification, the revision petition is dismissed.

Revision dismissed.

1970 CRI. L. J. 1316 (Vol. 76, C. N. 343)
(MYSORE HIGH COURT)

H. Homba Gowda, C. J.

In re Rudolph Gregory, Appellant

(Criminal Appeal No. 20 of 1966, D. 18.7-1968, against Judgment of S. J., Kolar, D. 17.12-1965)

Penal Code (1860), S. 361 — Expression 'takes out of the keeping of the lawful guardian of such minor' — Meaning of.

The points that emerge from the interpretation given to the expression 'takes . . . out of the keeping of the lawful guardian of such minor' are, (i) 'taking' referred to in S. 361, I. P. C. need not necessarily be physical removal by an accused person from the guardianship (ii) The person, who inspires or aids the decision of the minor girl to abandon her home, as much takes her out of the keeping of her guardian as one who removes or allures her out of such guardianship. (iii) A person who does not influence the will of the minor girl, is under no legal obligation to restore her to her guardian when the girl who forces herself upon him, but his act in preventing the penitent girl to go back to her guardian subsequently constitutes 'taking' her out, out of the keeping of her guardian. (iv) If on the other hand the evidence adduced by the prosecution establishes that it is the girl herself who left the house of her guardian and went to the accused person and induced him to accompany her and in consequence, she does not return to her guardian there being no conduct on the part of the man such as would amount to taking, no offence is committed under section 361, I. P. C. (1866) 10 Cox CC 402 & (1903) 20 Cox CC 249 & AIR 1965 S C 942, Rel. on.

(Para 5)

Cases Referred: Chronological Paras

(1965) AIR 1965 S C 942 (V 52) =

1965 (2) Cri L J 33, Varadarajan v. State of Madras

(1903) 20 Cox CC 249, Rex. v. James Jarvis

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(1866) 10 Cox CC 402, Reg. v. Christian Oliver

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Byra Reddy, for Appellant, S. R. Rego for State Public Prosecutor, for State.

JUDGMENT. — This appeal is directed against the Judgment of the Sessions Judge, Kolar in Sessions Case No. 9 of 1966 convicting the appellant Rudolph Gregory for an offence under S. 366 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for two years.

2. The charge against the appellant is that on the night of 20.7.1964 between 9.0 p.m. and 1 a.m. he kidnapped Miss Gene Royle aged 15 years from the lawful guardianship of her father V. M. Royle of Champion Reefs, K. G. F. in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. There was another charge against the appellant under S. 376 of the Indian Penal Code on the allegation that he committed rape on Miss Gene Royle on 2.4.1964 near Orogau Dairy within the limits of Champion Reefs Police Station, K. G. F. The learned Sessions Judge acquitted the appellant of this charge and the State has not preferred any appeal. Hence, I am not concerned with the said charge in the present appeal.

3. The facts which are either admitted or satisfactorily established and do not admit of any controversy briefly stated are as follows: Vivian Moss Royle was working as a Banksman in the Champion Reefs Mines, K. G. F. and was living at Door No 149, Top Lanes, Champion Reefs, K. G. F. along with his two daughters, namely, Oriana, Gene Royle and a son James, aged about 11 years. Miss Gene Royle was born on 11.12.1949. The mother of the girl namely Mrs Doris Royle was nurse in a Hospital attached to the K. G. F. Mines and was living with her husband at the relevant point of time. The appellant Rudolph Gregory, was living with his parents in a house opposite to that of Mr. V. M. Royle. The children of V. M. Royle used to spend much of their time in the house of the appellant during the absence of their parents. The appellant and Miss Gene Royle had become good friends during this period. The appellant and Miss Gene Royle used to carry on conversation with each other from their respective houses even in the presence of Mr. V. M. Royle.

On 2.4.1964 Mrs. Royle, who came from the Hospital, found the appellant and her daughter Miss Gene Royle engaged in conversation in the backyard of the house of the appellant. She rebuked Miss Gene Royle saying that she would report the matter to Mr. V. M. Royle

and took her to her house. On the night of 2-4-64 Miss Gene Royle was found missing from her house. Mrs. Royle suspected that the appellant must have a hand in her disappearance and had probably taken her away. Mr. and Mrs. Royle made enquiries with the parents of the appellant and did not get any useful information. They instituted a search but to no effect. They lodged a complaint in the police station at Champion Reefs stating that their daughter Miss Gene Royle was missing and that she may be traced. The officer in charge of the Police Station searched for the girl, but he could not find her. It is stated that the appellant and Miss Gene Royle sat talking till about 10 P. M. in Orogam Denary and went to the house of Edgar Vincent Gregory (P. W. 16) situated in R. A. T. A. Block in Champion Reefs at K. G. F. and stayed there for some time. On the morning of 3-4-1964 information to the effect that Miss Gene Royle and the appellant were in the house of P. W. 16 Edgar Vincent Gregory was known. The parents of the girl took the girl to their custody. They made an application to the Police Officer not to proceed with any investigation as the girl had been traced and recovered. After reaching their house, the parents of Miss Gene Royle requested the parents of the appellant to send away the appellant to some distant place, so that the girl and the boy may not continue to engage themselves in such activities. Eventually on 4-4-1964 the appellant was sent away to Salem by his parents as the maternal uncle of the appellant was running a workshop. The boy was employed therein. The appellant came back to K. G. F. on 15-7-1964 and was staying with his parents for some days.

On the night of 20-7-1964 as Mr. Royle had gone to attend to night duty, Oriana, Miss Gene Royle and James were the only three inmates of the house. Mr. Royle had locked the front door of the house from outside before he left from the Mines. At about 9-30 p. m. Miss Gene Royle opened the bolt of the back door of her house and went out of the house with the two suit-cases in which she had packed all her belongings. The appellant was waiting for her on the road and both of them went to "Hotel Gold Fields" at K. G. F. and spent the night in the hotel along with P. W. 17 Frank Rowe, a friend of the appellant. On the morning of 21-7-1964 the appellant and Miss Gene Royle went to Robertsonpet Bus Stand and boarded the bus H. M. S. Noor Express bound for Bangalore. Frank Rowe, who had accompanied these two persons stayed away at the bus stand itself. The appellant and Miss Gene Royle alighted from the bus near Lingarajapuram near Bangalore and went to the house of one Mrs.

Myrtle Davidson where they stayed till the next day evening. Thereafter the appellant and the girl went to the Cantonment Railway Station and spent that night on the platform itself. On the morning of 23-7-1964 the appellant and Miss Gene Royle went to Richards Park and stayed there till the evening. In the evening, they went back to the Railway Station at about dusk time and picked up their suit-cases for going back to the house of Mrs. Myrtle Davidson. While they were so going two constables and Mrs. Royle who had come to Lingarajapuram in search of them, apprehended the appellant and the girl and took them to Champion Reefs Police Station. In the meanwhile Mr. Royle had lodged a complaint as per Exhibit P. 16. On the basis of the said complaint the police took up investigation. The appellant was arrested and after completing the investigation placed a charge-sheet against the appellant for offences under Ss. 363 and 376 of the Penal Code in the Court of the Special First Class Magistrate, K. G. F. The learned Magistrate committed the appellant to take his trial in the Court of Session for the said two offences. The learned Sessions Judge, who received the committal order and the connected papers, perused them and framed charges for offences punishable under Ss. 376 and 366 of the Penal Code. As already stated, the learned Sessions Judge found the appellant guilty of the charge, punishable under S. 366 of the Penal Code and convicted, and sentenced him as stated above. He acquitted him of the charge under S. 376 of the Penal Code.

4. The only point of controversy is whether the version of the prosecution that the appellant kidnapped Miss Gene Royle from the lawful guardianship of her father Mr. Royle on the night of 20-7-1964 is true or the version of the appellant that the girl forced herself on him and she abandoned the guardianship of her father and came with him and that he simply took her from place to place at her desire, is true.

5. Taking or enticing a minor girl out of the keeping of the lawful guardianship is an essential ingredient of the offence of kidnapping. The mere fact that the appellant and Miss Gene Royle went away together or found in the company of one another in Lingarajapuram in the house of Mrs. Myrtle Davidson or in the Railway Station after leaving K. G. F., on the night of 20-7-1964 is by itself insufficient to find the appellant guilty of the offence. It must be established by the prosecution that the appellant was a person who by allurements or persuasion induced a minor girl to abandon her parents and run away with him. The expression 'takes.....out of the keeping of the lawful guardian of such minor' in S. 361, Penal Code has been interpreted by the Courts

and the points that emerge from these cases are : (i) 'Taking' referred to in S. 361, Penal Code need not necessarily be physical removal by an accused person from the guardianship. (ii) The person, who inspires or aids the decision of the minor girl to abandon her home, as much takes her out of the keeping of her guardian as one who removes or allures her out of such guardianship. (iii) A person who does not influence the will of the minor girl, is under no legal obligation to restore her to her guardian when the girl who forces herself upon him, but his act in preventing the penitent girl to go back to her guardian subsequently constitutes 'taking' her out, out of the keeping of her guardian. (iv) If on the other hand the evidence adduced by the prosecution establishes that it is the girl herself who left the house of her guardian and went to the accused person and induced him to accompany her and in consequence, she does not return to her guardian there being no conduct on the part of the man such as would amount to taking, no offence is committed under S. 361, Penal Code. This principle was first enunciated in *Reg. v. Christian Olafir*, (1866) 10 Cox CC 402. In that case Baron Bramwell stated the law as follows in the course of the charge to the jury :—

"I am of opinion that if a young woman leaves her father's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no infringement of this Act of Parliament (24 and 25 Vict. C. 100, S. 53) for the Act does not say he shall restore her, but only that he shall not take her away."

Again in *Rex. v. James Jarvis*, (1903) 20 Cox CC 249, Jelf, J. stated the law to the Jury thus :

"Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to conviction, it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments. The question for you is whether the active part in the going away together was the act of the prisoner of the girl, unless it was that of the prisoner, he is entitled to your verdict. And even if you do not believe that he did what he was morally bound to do—namely tell her to return home—that fact is not by itself sufficient to warrant a conviction, for if she was determined to leave her home and showed prisoner that, that was her determination and insisted on leaving with him—or even if she was so forward as to write and suggest to the

prisoner that he should go away with her and he yielded to her suggestion, taking no active part in the matter, you must acquit him. If however prisoner's conduct was such as to persuade the girl, by blandishments or otherwise to leave her home either then or some future time, he ought to be found guilty of the offence of abduction."

The law as enunciated above was approved by their Lordships of the Supreme Court in *Varadarajan v. State of Madras*, AIR 1965 SC 912. Their Lordships observed in the course of their judgment as follows :—

"It must, however, be borne in mind that there is a distinction between 'taking' and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S. 361, Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian." Their Lordships further observed in the course of the same Judgment as under :—

"It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to taking."

6. I will now proceed to examine the evidence on record in the light of the principles—

enunciated above. [After examining evidence His Lordship proceeded.—Ed.]

7.12. It is clear from the above that the girl had been wound up to such a pitch of hatred of her mother Mrs. Royle and of her surroundings and was making all out efforts to prevail upon the appellant to take her out of her parents' (house) and marry her. It is in these circumstances that she was found in the company of the appellant from the night of 20.7.1964 till she was taken away by her mother and police constables on the afternoon of 28.7.1964. I am, therefore, of the opinion that unless there is clear and cogent evidence to show that she did not leave her father's house voluntarily by herself and that her leaving was brought about by the appellant there can be no conviction against him for an offence under S. 366 of the Indian Penal Code.

13. In the state of evidence on record it is idle for any one to contend that it is the appellant that actually made her to abandon her parental house by inducement or promise or blandishment and took her away from her house on the night of 20.7.1964. On the other hand the letters of the girl speak eloquently of the fact that she was determined to leave her home and insisted on leaving with him. The mere fact that the appellant yielded to her request and took her away with him, taking no active part in the matter, does not make him liable to answer a charge punishable under S. 366 of the Indian Penal Code.

14. I have carefully examined the entire evidence placed on record. I am of the opinion that in the state of evidence on record the learned Sessions Judge is not at all justified in finding the appellant guilty of the offence punishable under S. 366 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for two years. The judgment of the learned trial Judge cannot be justified.

15. In the result, therefore, for the reasons stated above this appeal is allowed and the conviction and sentence passed against the appellant are set aside. The bail bonds are ordered to be cancelled.

Appeal allowed.

1970 CRI. L. J. 1321 (Vol. 76, C. N. 346)
(MADRAS HIGH COURT)

SOMASUNDARAM J.

In re, Abdul Khader, Appellant.

Criminal Appeal No. 16 of 1968, D/- 23-9-1969, against order of S. J., Dharampuri Division at Krishnagiri, D/- 12-1-1968.

LM/DN/F863/G9/AKJ/M

Penal Code (1860), S. 493 — Scope— Section is not intended to punish one for contracting marriage which turns out to be illegal — It only punishes man for obtaining body of woman by deceitfully assuring her that he had acquired that right by *jus mariti*. (Para 1)

C. K. Venkatanarasimham, for Appellant;
S. Jagadeesan, for Public Prosecutor, for State.

JUDGMENT. — Abdul Khader, the appellant herein, stands convicted and sentenced by the Sessions Judge, Dharmapuri Division, at Krishnagiri, to suffer rigorous imprisonment for two years for an offence under S. 493 of the Penal Code. Section 493 of the Penal Code punishes persons who cohabit with a woman after deceitfully making a belief in her that she was legally married to him. The prosecution case was that on 16th January 1967, the appellant by deceit, made P. W. 1 believe, that she was married to him and after creating such a belief in her mind, he made her cohabit with him. The defence of the appellant was one of denial.

The learned Sessions Judge found that the appellant went through a form of marriage knowing that it was not the proper form and thereby deceived P. W. 1, and made her have sexual intercourse with him. The appellant is not a stranger to P. W. 1 because he is her cousin. He had given a new saree and ear ornaments to her. There was also an exchange of garlands in the presence of P. Ws. 3, 4 and one Lal Batcha. They lived together as husband and wife for a few days. The appellant had taken P. W. 1 to his house, and after two days, his sister, brother-in-law and father had pushed P. W. 1, out. The appellant had asked her to remain with her grand-mother stating that he would fix up a house and then take her. The appellant had also admitted to P. W. 5 that he had married P. W. 1. These circumstances establish that he never practised any deception on her. The section is not intended to punish one for contracting a marriage which turns out to be illegal. But it only punishes a man for obtaining the body of the woman by deceitfully assuring her that he had acquired that right by *jus mariti*. P. W. 1 in this case was lawfully married to the petitioner. Further, there has been no deceitful assurance or act on his part so as to attract S. 493, Penal Code. The conviction is not correct. Both the conviction and sentence are set aside. The appellant is acquitted of the offence under which he stands convicted. The bail bond will stand cancelled. The appeal is allowed.

Appeal allowed.

1970 CRI. L. J. 1322 (Vol. 76, C. N. 347)
(ORISSA HIGH COURT)

G. K. MISRA AND S. ACHARYA, JJ.

State, Appellant v. Dhusa Kandy and
others, Respondents.

Govt. Appeal No. 7 of 1966, D/- 12.12-1968,
against order of Addl. S. J., Cuttack D/- 2.12-
1965.

(A) Criminal P. C. (1898), S. 154 —
First information can be used only for
purpose of contradiction—(Evidence Act
(1872), Ss. 145, 155) (Para 3)

(B) Evidence Act (1872), S. 33 —
Witness dying before Sessions trial
began — Held, his evidence in commit-
ting Court was admissible under S. 33
(Para 3)

(C) Evidence Act (1872), S. 3 — Rela-
tionship how far ground for discarding
evidence of witness.

In a trial for murder the evidence of the
witnesses cannot be discarded merely on the
ground that they are related to the deceased.
That is based on the common sense view that
ordinarily a relation should not implicate
persons who are not involved in the murder.
In such cases, however, the court requires
some sort of independent corroboration to
lend assurance to the conviction that they
are witnesses of truth (Para 4)

(D) Criminal P. C. (1898), Ss. 417, 423
— Appeal against acquittal—Assessment
of evidence — Scope.

The power of High Court in the matter of
assessment of evidence is as wide in an appeal
against an acquittal as it is in an appeal
against a conviction. High Court has got full
powers to review the entire evidence and
come to a different conclusion. This is, how-
ever, subject to the rider that the presumption
of innocence in favour of the accused has
been reinforced by the factum of acquittal.
While setting aside an order of acquittal, the
Court must keep in view the aforesaid juristic
theory, and if, on assessment of evidence, it is
satisfied that the view taken by the lower
Court is not a reasonable one, then the order
of acquittal is to be set aside (Para 6)

Standing Counsel, for Appellant; H.
Kanungo, for Respondents.

G. K. MISRA, J. — The three respondents
stood trial under Ss. 380 and 302/34, Penal
Code and were acquitted. The State has filed
this appeal against the order of acquittal.

2. The prosecution case may be stated in
brief. Admittedly the accused had some land
dispute with the deceased. On 15-1-65 the
accused came to the house of the deceased

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and tried to remove paddy sheaves. The
deceased was aroused from sleep. While
accused No. 1 was removing a paddy sheave,
the deceased caught hold of it. Accused No. 1
dragged him. Accused No. 2 gave the second (first
— Id) stroke on the head. Accused No. 1 then
gave the second stroke, and when the deceased
fell down with his face upwards accused No. 3
gave the third stroke. The deceased died
instantaneously on the spot. Kashi Kandy
(since deceased) a son of the deceased, lodged
the F. I. R. on 16-1-65 at 2 to 3 P. M. the
police station being at a distance of 22 miles
from the village. After necessary investigation
a charge sheet was submitted against the
accused persons. The defence is one of com-
plete denial. Two defence witnesses were
examined in support of a story that the
deceased killed him while he was alone
on the point of death arising out of a severe
ailment. The learned Sessions Judge held that
the death was homicidal and that the defence
story was fantastic. He however acquitted the
accused persons on finding that the prosecu-
tion failed to establish the case beyond reason-
able doubt.

3. It is to be noted that Kashi Kandy
lodged the F. I. R. (Ext. 6) He did not dis-
close in the F. I. R. as to how the deceased
was assaulted by these accused persons. He
started the story from the point that the
deceased made a hulla which aroused Kashi
from sleep. On coming out he noticed accused
Nos. 1 and 2 standing with lathis and the
deceased lying in front of the door in a pool
of blood with severe injuries. The deceased
was dead. The two accused persons ran away
on seeing him. Kashi was examined in the
committing Court. There he made a develop-
ment that accused No. 3 was also involved in
the murder. He also gave out details as to in
what manner the accused persons assaulted
the deceased. The F. I. R. is a former state-
ment of Kashi and it can be used only for the
purpose of contradiction. His evidence in the
committing Court is admissible under S. 33
of the Evidence Act. There was not only an
opportunity for cross-examination by the
defence, but in fact he was cross-examined. On
reading his evidence in the committing Court
we are unable to accept him as a witness of
truth. If he were an eye witness, he could not
have omitted in the F. I. R. the name of ac-
cused No. 3 and the important details as to how
the assault was made. We accordingly place
no reliance on the evidence of Kashi who died
before the sessions trial began.

4. P. Ws. 1, 2, 3, 4, 8 and 9 are the eye-wit-
nesses. P. W. 9 is the son of the deceased.
P. W. 8 is his brother. P. W. 7 is the son of
P. W. 8. P. W. 1 has married the sister-in-law
of P. W. 7. P. W. 1's first wife was a relation

of the accused who was driven out by P. W. 1 about 30 years ago. The father of P. W. 4 is the maternal uncle of P. W. 2. P. W. 4 had admittedly enmity with the accused. In a previous case he was alleged to have assaulted the accused. He was medically examined and his injury report was submitted by the Doctor. He was not straightforward enough to admit the simple facts. From the aforesaid discussion, it would be apparent that all the prosecution witnesses are either relations of the deceased or inimically disposed of towards the accused. It is well settled that the evidence of the witnesses cannot be discarded merely on the ground that they are related to the deceased. That is based on the common sense view that ordinarily a relation should not implicate persons who are not involved in the murder. In such cases, however, the Court requires some sort of independent corroboration to lend assurance to the conviction that they are witnesses of truth.

In this case we do not get any corroboration. The positive story of the prosecution is that some bundles of paddy were removed from the house of the deceased by the accused, and there were trails of paddy falling in between. The I. O. did not find any trails of paddy falling on the way. He did not also seize any paddy sheaves from the house of the accused or from any place under the control of the accused. The lathis used as weapons of offence have not been recovered. There is therefore no independent corroboration of these witnesses. Added to this, there is some substantial discrepancy in the evidence of these witnesses. For instance, P. W. 2 states that, by the time he arrived, other eye-witnesses excepting the two sons of the deceased had not come and all of them came after the deceased fell down. This knocks the very bottom of the prosecution story. Similarly he says that the deceased fell down after accused No 3 gave a stroke with his lathi. This is contrary to the prosecution story of the remaining witnesses that accused no. 3 gave a stroke after the deceased fell down with his face upwards. There is thus material discrepancy as to the time when different witnesses arrived at the spot and as to the manner of assault.

5. In the aforesaid state of affairs, we are to consider whether the order of acquittal is to be set aside. Law is well settled that the power of this Court in the matter of assessment of evidence is as wide in an appeal against an acquittal as it is in an appeal against a conviction. This Court has got full powers to review the entire evidence and come to a different conclusion. This is, however, subject to the rider that the presumption of innocence in favour of the accused has been reinforced by the factum of acquittal.

While setting aside an order of acquittal, the Court must keep in view the aforesaid juristic theory, and if on assessment of evidence it is satisfied that the view taken by the lower Court is not a reasonable one, then the order of acquittal is to be set aside.

6. Keeping the aforesaid perspective in view, for reasons stated already, we are not in a position to say that the view taken by the learned Sessions Judge is not a reasonable one in the facts and circumstances of this case.

7. We accordingly dismiss this appeal. The respondents are in jail. They be set at liberty forthwith.

8. ACHARYA, J.—I agree.

Appeal dismissed.

1970 CRI. L. J. 1323 (Vol. 76, C. N. 353)
(PATNA HIGH COURT)

S. WASIUDDIN J

Sadan Prasad, Petitioner v. State of Bihar,
Opposite Party.

Criminal Revn. No. 433 of 1968, D/- 8.1-1969, from order of Asst. S. J., Patna, D/- 12-12-1967.

Penal Code (1860), S. 294 — Sentence — Accused under twenty-one years age teasing a girl going to school—Utterance "Ban Than Kar Kahan Ja rahi ho", Come on my cycle, I shall reach you to school", held within S. 294—Case not fit for exercising powers under S. 6, Probation of Offenders Act — Imposition of substantive sentence held correct

(Para 6)

Rajendra Prasad, for Petitioner; Manindra Nath Verma, for Opposite Party; Swaraj Prasad, for Complainant.

ORDER.—There is only one petitioner in this case. He has been convicted under Section 294 of the Indian Penal Code and sentenced to undergo simple imprisonment for one month. After his conviction by the learned Magistrate, the petitioner preferred an appeal, which was heard by the learned Assistant Sessions Judge of Patna, and the appeal was dismissed. The petitioner thereafter preferred the present application in revision and it may be mentioned that it was admitted by the Bench only on the question of sentence.

2. The case of the prosecution, briefly stated, was as follows. Vijay Rani (P. W. 3), daughter of the informant Awadhesh Kumar Verma, an employee of the Public Relation Department of the Government of Bihar, was in the morning shift of the School and on the 12th

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November, 1965, at about 6 A. M. the informant went to the main road with his daughter so that he may reach the girl to the bus for going to her School. It is said that at that time, when the informant had gone some steps ahead behind his daughter, the petitioner came on a cycle from a lane and he slowed his cycle near the girl and accosted her. He uttered the words, 'Rani Ban Than Kar Kahan Ja Rahu Ho.'

It was the further case of the prosecution that the petitioner told the girl to come along with him on his cycle and he would reach her. The age of the girl was about 12 to 13 years and it is further said that the petitioner was in the habit of teasing and vexing her by using vulgar and obscene words, whenever this petitioner found the girl passing alone.

3. According to the prosecution, the informant ran to catch hold of the petitioner, but he speeded his cycle and fled away from there. But, Radha Shyam Dutta (P. W. 2), who is a retired responsible Government Officer, was close by and he would see the occurrence and could identify the petitioner. An F. I. R. was lodged and then the Police took up investigation and charge sheet was submitted in the case. The learned Magistrate, as stated above, found the petitioner guilty of the offence under Section 294 of the Penal Code and there is thus a concurrent finding both by the learned Magistrate and the learned Assistant Sessions Judge, who heard the appeal, on the point that the petitioner was guilty under S. 294 of the Penal Code.

4. As stated above, the present application in revision has been admitted only on the question of sentence and, therefore, the only point which arises for consideration is whether in this case there would be any justification for interference or some modification in the sentence which has been imposed on the petitioner.

5. The learned Counsel appearing for the petitioner has submitted that considering the age of the petitioner and also the report of the Probation Officer, the petitioner should have been let off on probation and an order should have been passed as contemplated by S. 6 of the Probation of Offenders Act. This position is not disputed that the petitioner was below twenty-one years of age and he would thus come within the purview of S. 6 of the Probation of Offenders Act. The report of the Probation Officer had also been called for and it is on the record. I have also looked into that report. I also had from the Judgment, both of the learned Magistrate as well as of the learned Assistant Sessions Judge, that they were fully cognizant and conscious of the provisions of the Probation of Offenders

Act and they have also considered the report of the Probation Officer, which had been received in the case. But, considering the nature and the circumstances of the case, both the Courts did not think it proper to pass an order, as contemplated by S. 6 of the Act and they have given good and cogent reasons, in my opinion, for awarding a substantive sentence of imprisonment against the petitioner.

The learned Assistant Sessions Judge has also referred to this aspect of the matter that offences of the nature of teasing school girls are becoming very common and, I think, the Courts cannot also shut their eyes to what is happening. At the time of hearing this matter, my reaction was that the sentence which had been passed was rather lenient, but unfortunately, I find that S. 294 of the Penal Code lays down a maximum sentence of three months, and, I think that perhaps the Legislature may have to think of amending the section in context of the events which are happening, so that a more severe sentence may be provided in this section.

6. Considering all the aspects of the matter, I do not think that it is a fit case, in any way, in which the powers under the Probation of Offenders Act should be exercised and the learned Magistrate and the learned Assistant Sessions Judge rightly did not pass any such order as contemplated by S. 6 of the Act and they have very correctly passed a substantive sentence.

7. The revision application is therefore, dismissed

Petition dismissed.

1970 CRI. L. J. 1324 (Vol. 76, C. N. 349)
(TRIPURA J. C.'S COURT)

R. S. BINDRA J. C.

Ganga Charan Goala, Petitioner v. Chandra Kumar Roy, Respondent.

Criminal Revn. No. 3 of 1968, D/- 13.10.1969, from order of Addl S. J., Tripura, D/- 6.1.1968.

(A) Criminal P. C. (1898), S. 139-A (1) — Questioning about existence of public right mandatory — Adjournment of proceeding from time to time without questioning person proceeded against — No infringement of S. 139-A (1).

Under S. 139-A (1) the Magistrate is specifically enjoined not to act either under S. 137 or S. 138 before enquiring from the person proceeded against if he denies the existence of public right, mentioned in the conditional order under S. 133. But if the Magistrate has not proceeded either under S. 137 or S. 138

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and has simply adjourned the case from time to time without putting the question to the person proceeded against on his first appearance, it would be unjust to contend that he has infringed the provisions of sub-s. (1) of S. 139A in any manner. (Para 6)

(B) Criminal P. C. (1898), S. 142 — Action under S. 142 (2) cannot be taken before issuing injunction under S. 142 (1) to persons concerned — Magistrate directing police to remove obstruction to pathway while passing conditional order under S. 133 — Direction to police is illegal. — (1948) 52 Cal W N 757, Rel. on. (Para 7)

(C) Limitation Act (1963), S. 3 (1) and Art. 131 — Application for revision against order under Ss. 133 and 142, Criminal P. C. filed beyond 90 days prescribed by Art. 131 — Application has to be dismissed under S. 3 (1) — (Criminal P. C. (1898), S. 439). (Para 8)

(D) Constitution of India, Art. 227 — High Court can exercise its powers suo motu provided there is error apparent on face of record — Illegal direction to police under S. 142 (2), Criminal P. C. — Order set aside. (Para 3)

Cases Referred: Chronological Paras
(1948) 52 Cal W N 757, Jobed Ali v. The Crown 7

M. C. Chakraborty, for Petitioner; R. L. Chakraborty, for Respondent.

ORDER. — On 10-6-1966, Chandra Kumar Roy made an application before the Sub-Divisional Magistrate, Agartala, under S. 133 of the Criminal P. C., alleging that a narrow pathway running through the land of Ganga Goala (the petitioner herein) and Birendra Bejoy Majumder in the village of Subhashnagar, also known as Jirania Daspara, had been under the use of village people, comprising of about 100 families, since 1946, for their normal agricultural and other pursuits, that that pathway also leads to Development Block Office, the Primary Health Centre, the Co-operative Marketing Society and the Veterinary Hospital in the village, and that Ganga Goala had recently demolished the pathway much to the inconvenience of the residents of the village. It was also alleged that the petitioner had been using the pathway for proceeding to his agricultural lands and that since the day Ganga Goala had demolished it, he found it difficult to take his bullocks from his house to the lands and likewise was the situation with the other members of the village community. Chandra Kumar therefore prayed that necessary steps should be taken to undo the wrong committed by

Ganga Goala, which meant in other words the restoration of the pathway.

2. The Sub-Divisional Magistrate forwarded the application of Chandra Kumar to the Officer-in-Charge of the Kotwali police station for enquiry and report. On receipt of report from that Officer, he passed the conditional order on 18th of July 1967, under S. 133 of the Code, directing Ganga Goala to remove the obstruction and to show cause by 28th of July 1967. Simultaneously, the Sub-Divisional Magistrate asked the Officer-in-Charge of the Kotwali police station to "open" the road temporarily for bringing paddy, under S. 142, Criminal P. C."

3. In response to the notice issued to him, Ganga Goala appeared before the Sub-Divisional Magistrate on 24-8-1966, when he prayed for time for showing cause against the conditional order. Adjournment was granted to him but Ganga Goala failed to show cause even on the adjourned date and once again prayed for time. The Sub-Divisional Magistrate exhibited indulgence and allowed him no less than nine adjournments for the purpose and the last adjournment was for the date 19-4-1967. However, in the meantime, on 11-4-1967, Ganga Goala presented a revision petition in the Court of the Sessions Judge urging that the proceedings taken against him under S. 133 should be quashed. The revision petition came up for hearing before the Additional Sessions Judge, Shri N. M. Paul, who rejected the same by order dated 6-1-1968. Having felt aggrieved with that order, Ganga Goala filed the instant revision petition in this Court.

4. Shri M. C. Chakraborty appearing for Ganga Goala, has raised two points in support of the claim that the entire proceedings taken by the Sub-Divisional Magistrate stand vitiated. Firstly, it is urged that it was obligatory for the Sub-Divisional Magistrate, as enjoined by S. 139A of the Code, to question Ganga Goala immediately the latter put in appearance before him as to whether he denied the public right claimed in respect of the pathway in dispute, and that since Ganga Goala had not been questioned on that point, the proceedings stand wholly vitiated. The second point raised is that the Officer-in-Charge of the Kotwali police station could be directed to open the pathway only if Ganga Goala had been asked to do the needful by means of an injunction issued under S. 142 (1) of the Code and he had failed to comply with the direction given. Shri R. L. Chakraborty, representing Chandra Kumar, has urged, on the other hand, that no irregularity or illegality had been committed by the Sub-Divisional Magistrate, that the proceedings taken by him are

in accord with the provisions of the law, and that at any rate the revision petition is barred by time.

5. The points that require determination are, (i) whether the Magistrate had violated in any manner the provisions of S. 139A, (ii) whether provisions of S. 142 had been contravened by issuing a directive to the Police Officer for removal of obstruction and (iii) whether the revision petition made in the Court of the Sessions Judge was barred by time.

6. I propose examining the three points serially. It is correct that sub-section (1) of S. 139A prescribes in categorical manner that where an order is made under S. 142 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of the public right, and if he does so, the Magistrate shall, before proceeding under S. 137 or S. 138, inquire into that matter. It is not disputed that the provisions of sub-section (1) are mandatory in nature and their violation vitiates the proceedings. The Magistrate is specifically enjoined not to act either under S. 137 or S. 138 before enquiring from the person proceeded against if he denies the existence of public right, mentioned in the conditional order. However, since in our case the Magistrate has not proceeded either under S. 137 or S. 138, therefore, it would be unjust to contend that he has infringed the provisions of sub-section (1) of S. 139A in any manner.

It would have been much better, I agree, if before adjourning the case from time to time at the instance of the present petitioner the Magistrate had put him the question contemplated by that section at the first hearing. Nevertheless, it is not clear how there has been any violation of the statutory provision. Consequently, I repel the first submission made by Shri M. C. Chakraborty on holding that the Magistrate is not yet late in putting Ganga Goala the statutory question.

7. Sub-section (1) of S. 142 enacts that if a Magistrate, making an order under S. 133, considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury pending the determination of the matter. Sub-section (2) of the same section provides that in default of such person forth-

with obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury. A plain reading of the two sub-sections makes it clear that recourse to the step envisaged by sub-section (2) can be taken only if firstly an injunction is issued under sub-section (1) to the person against whom the conditional order was made and, secondly, if he had failed to obey the same. In this view of the Legislature's directive, the Magistrate cannot act under sub-section (2) without first issuing an injunction under sub-section (1). That clearly leads to the conclusion that the Magistrate was illegally unjustified in directing the Police Officer to open the road while passing the conditional order itself. The learned Additional Sessions Judge has described that part of the order as "highly irregular and illegal." I agree that it is so. The Calcutta High Court held in the case of *Johed Ali v. The Crown*, (1948) 52 Cal W N 757, that no action can be taken under sub-section (2) of S. 112 without first issuing an injunction under sub-section (1) of that section. With respect I agree with that proposition of law. Therefore, I hold that the direction issued to the Police Officer by the Magistrate was illegal.

8. This brings us to the question of limitation. The direction to the Police Officer was issued on 18.7.1966, the date on which the conditional order was made, while the revision application was filed in the Court of the Sessions Judge on 11.1.1967. According to Art. 131 of the Limitation Act, 1963, the petitioner could have filed the revision within 90 days from the date of the impugned order. The revision petition was, therefore, hopelessly barred by time. I see no escape from that conclusion. Sub-section (1) of S. 8 of the Limitation Act provides emphatically that, subject to the provisions contained in Ss. 4 to 24, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. In face of this statutory injunction, I have no alternative but to hold that the revision petition had been rightly rejected by the learned Additional Sessions Judge as barred by time.

9. However, I feel inclined to interfere under Art. 227 of the Constitution with a view to set aside the illegal order issued by the Magistrate directing the Police Officer to restore the pathway temporarily. It is well settled that the High Court can take recourse to the provisions of Art. 227 suo motu provided there is an error apparent on the face of record. As held above, the Magistrate had no legal authority to give direction to the Police Officer without first issuing the injunction

order under S. 142 (1) requiring the present petitioner Ganga Goala to do the needful and he had failed compliance. The legal error committed by the Magistrate is too apparent on the record. Hence, I set aside the order directing the Police Officer to restore the pathway temporarily.

10. As a result, I accept the revision petition to the extent that the order issued to the Police Officer is vacated. The other prayers made in the petition are disallowed. The case is remanded to the Magistrate with the direction that he should proceed further in accordance with the provisions of law contained in Ss. 139 and 142 of the Code. He may, in his discretion, proceed against Ganga Goala for not complying with the conditional order issued under S. 139 nor showing cause against the same.

Case remanded.

1970 CRI. L. J. 1327 (Vol. 76, C. N. 350) =

AIR 1970 ASSAM AND NAGALAND 121
(V 57 C 29)

P. K. GOSWAMI, C. J. AND
D. M. SEN, J.

Majan Mia and others, Accused-Appellants v The State, Respondent.

Criminal Appeal No 119 of 1968, D/- 23-2-1970, from order of S. J., Cachar, D/- 19-11-1968.

(A) Evidence Act (1872), S. 32 — Dying declaration — Recording of — Correct mode — It must be recorded in the exact words of declarant — It need not be in the form of questions and answers — Further, it may be open to objection if information is elicited by putting leading questions. (Para 3)

(B) Evidence Act (1872), S. 5 — Credibility of witnesses — Witness trying to implicate persons in a serious charge of murder is unreliable. (Para 10)

M. H. Choudhury and M. S. Rahman, for Appellants; R. C. Choudhury, Public Prosecutor, for Respondent.

GOSWAMI, C. J.:— This appeal is by three appellants who are the only convicted persons out of twelve including them charged before the Court of Session under various sections of the Indian Penal Code. These three were convicted under Sections 302/149, 302/34 and 147, I.P.C. and sentenced to imprisonment for life under the first two sections and one year's R.I. under Section 147, I.P.C.

2. Prosecution case as revealed in the first information report is that on 2nd September, 1966 at about 8-00 A.M. when Ramesh Chandra Nath (deceased) and his

son Rabindra Kumar Nath (P.W. 4) were ploughing their land, accused Majan Mia along with 30/35 persons armed with lenjas, spears, daos and lathis attacked them from all directions. Ramesh and Rabindra received severe injuries and Ramesh who was removed to the Bar-khola hospital succumbed to the injuries the same day after a dying declaration had been recorded by the doctor attending him there. Rabindra who received medical treatment at Silchar has survived the attack.

3. According to the prosecution, Ramesh and his brothers have cultivable land under jote from their aunt Champak Devi measuring about 14 kears and they have been in possession of the same since the time of her husband under whom also they had held the land. Ramesh was separate from his other brothers and while he had separate possession of four kears, he also along with his brothers had joint possession of the remaining kears. It is said that on the date of occurrence when Ramesh and Rabindra were on their field ploughing a portion of this land, the accused persons along with many others came in two boats and attacked them resulting in injuries to both the persons with the result as above stated.

4. Prosecution examined 13 witnesses including two doctors and two police officers. The evidence of another doctor who was examined in the Committing Court has been tendered in the court below. The defence of the accused is that they are innocent and accused Majan particularly states that the land was in his possession under Champak Devi and that his servants Jonab Ali, Aktar Ali, Jomsed Ali and Irsad Ali went to the field for clearing water hyacinth and he knows nothing about the occurrence.

5. Prosecution rests on the evidence of Lakshyaman Nath (P.W. 1), Rabindra Chandra Nath (P.W. 4), Gour Ch. Rai (P.W. 6), Basant Rai (P.W. 7), Girindra Das (P.W. 8), Kumud Ranjan Nath (P.W. 9) and Suresh Chandra Nath (P.W. 10), who, according to it, saw the occurrence. It may be noted here that the learned Sessions Judge disbelieved the evidence of P.Ws 1, 6 and 7 and the learned Public Prosecutor who appears on behalf of the State fairly concedes that he cannot say that the conclusions arrived at by the learned Sessions Judge with respect to them are unjustified. We have gone through the evidence of these three witnesses and are satisfied that the learned Judge was justified in not relying upon their testimony for the purpose of considering the charges against the accused persons. We may only briefly state that P.W. 1 is no one else than the brother of the deceased and wrote a detailed first information report, according to him, on

the verandah, of the hospital after death of his brother and lodged the same at the Thana at 4-00 P.M. although the Thana record under Section 154 of the Criminal Procedure Code shows that the report was lodged at 12 noon. Be that as it may, this ejhar was prepared after the death of his brother which is clearly noted in the document itself. Although he does not categorically state in this ejhar that he had seen the occurrence, reading it, one takes the impression that he had seen Majan, his son and nephews attacking the persons, being armed with various weapons. In evidence he mentions having met various witnesses at the place of occurrence, but he does not state any names in this ejhar. On the other hand, he states that "the names of other accused persons and witnesses will be revealed at the time of investigation". So far as the accused are concerned he only names Majan Ali, his son and nephews along with 30/35 persons. Since admittedly Majan Ali has two sons facing trial and he has used singular number in the ejhar, it is not even clarified during investigation which son was meant by this witness. There is also nothing to show that any of the accused persons facing trial are the nephews of Majan Ali. Be that as it may, P.W. 1 stated that he reached the place of occurrence first of all. He also stated that his brothers also arrived there. He was in his house at the time and the place of occurrence would be about half a mile from his house. He further stated that

"suddenly, at about morning 7/8 heard hulla 'Ramesh Nath is being murdered by persons' in the field. I went to the place of occurrence and saw accused Majan Mia dealing blows on the head of Ramesh Nath with a lathi from a distance of 20/25 nals. At that time I saw another of 20/25 persons in the boat. The boat anchored at a distance of 20/25 nals to the west of the place of occurrence. Majan Mia got up on the boat having dealt blows x x x x x. As soon as they had got up on the boat and I had just reached the place, the boat sailed away. Another boat was sailing to the south-west of this boat at (a) distance of 20/25 nals."

It is therefore clear that this witness could not have seen the occurrence. On his own showing he was half a mile away and there is evidence on record to show that there was flood and the entire area was flood-affected and people had to punt their boats in order to go from one place to another. The learned Sessions Judge is therefore perfectly justified in rejecting the testimony of this witness.

6. P.W. 6 also saw the assault from his house which is about two furlongs from his homestead. This witness stated that he had identified accused Nisar Ali,

who is not an appellant, in the jail. It is also not clear why this witness had to be taken to the jail for identification of accused persons. We have nothing to show that there was any test identification parade held in this case although the ejhar only gave the name of Majan and none else. This witness came by boat from his house after hearing alarm to the effect "man is being killed". He admits that the place of occurrence was not visible before he got up on the boat and men came to their sight only after he had advanced about 20/25 nals by boat. It is difficult to rely on the testimony of recognition of accused persons as assailants by this witness. The learned Judge was fully justified in discarding his testimony. P.W. 7 also was at his house and went to the place of occurrence after hearing a cry "I am being killed — I am being killed". He went on the same boat with P.W. 6 and another Padmalal who is not examined in the case. For the reasons already given for discarding the evidence of P.W. 6, we are unable to rely on the testimony of this witness as well and agree with the finding of the learned Sessions Judge in this respect.

7. There remains now the evidence of P.Ws 4, 8, 9 and 10. P.W. 4 is the son of the deceased and he also received severe injuries on his person. He stated that Majan first dealt a lathi blow on the head of his father. Then all the persons began to assault. Father raised alarm and he rushed towards him. Then Nimar blocked his way and Majan hurt him with a lathi. Then Majan inflicted a "Sulphi" on his head. When Abdul Jabbar dealt cut blow, he tried to catch hold of the same and sustained injury on his hand. He fell down when all assaulted him and he lost his sense. According to him, he regained his sense at Barkhola hospital. In the course of cross-examination he was confronted with an earlier statement which he had made before the police to the effect that he stated to the police that the accused persons first assaulted him getting down from the boat and then he lost his sense. This statement, which he denies, has been proved by the defence through the police officer (P.W. 13). If his earlier statement to the police is correct and he was the first man to be assaulted as a result of which he fell down senseless, his testimony that he had seen the assault on his father cannot be relied upon. Unfortunately there is no charge framed against all these accused persons for assaulting this witness.

8. At this stage we have also to bear in mind the dying declaration of the deceased. The learned Sessions Judge has brushed aside this statement which is marked as Ext 3 as unimportant. We are, however, unable to treat it in the

manner in which the learned Sessions Judge has dealt with this important piece of evidence. The statement of the deceased recorded in Ext 3 may be set out—

"I went to plough. Junab Ali and his sons and brother and 30/35 persons — I do not know their names — assaulted me with lenja, spear, dao and lathi. Majan hurt me on my head".

It is curious as well as intriguing that the police officer who must have seen this dying declaration took no steps to put Junab Ali and his sons and brother under arrest. Even though the learned Sessions Judge during the course of the trial has considered that this document is not important, the investigating officer had no reason to think about it in the same way while he was commencing investigation in order to track the offenders. This is a most unsatisfactory way of investigating a case under murder charge.

P.W. 4 does not say a word about Junab Ali and his sons and brother although the deceased had made such a statement. The doctor (P.W. 6) who recorded the dying declaration stated that the injured spoke in a distinct tone and he faced no difficulty in understanding what he said. We are not impressed with the evidence of P.W. 4 in giving a complete go-by, for reasons best known to him, to the story given by the deceased who was passing away within a short time of making that statement. It is not possible to think that at that hour of impending death the deceased, in the entire circumstances of this case, would implicate Junab Ali, his sons and his brother if they were not really the assailants. It is further intriguing that Lakshyamani Nath (P.W. 1) does not state a word regarding Junab Ali, his sons and his brother, but instead implicates Majan, his son and nephews. There is therefore, scope for thinking that the servants of Majan have been given a go-by and the master has been brought to the scene to avenge the unfortunate death. There is another infirmity in the dying declaration that Majan as such has not been named therein, but if he is the person he has been described as Mijan. Prosecution has not taken any care to bring to light whether Majan was also known in the village as Mijan. The learned Sessions Judge was not justified for the reasons given by him to discard the dying declaration in the way that he has done. It is not necessary that the dying declaration should be in the form of questions and answers. The declaration should be taken down in the exact words of the person making it. It should be *ipsissima verba* of the person making it. On the other hand, it may be open to objection if leading questions are put to the declarant for the purpose of eliciting information. It is for the Court to decide in

the circumstances of each case whether the statement recorded is the free, voluntary, clear and unambiguous statement of the deceased at the time when he was capable of making that statement. This document has fulfilled that test in the case on the evidence of the doctor who recorded the same. To brush aside this dying declaration is only to deprive the accused of the benefit which they could easily claim in a case of this nature, when some other accused are substituted for the prominent ones mentioned by the deceased. Keeping this aspect in view also we are unable to give any credence to the evidence of P.W. 4 which we discussed above.

9. P.W. 8 has land contiguous west of the land of Gour Netai which is to the adjacent east of the place of occurrence. He was said to be on his land when he heard a cry in the jote land of Ramesh Nath. He saw about 15/20 persons assaulting Ramesh Nath and his son with lathi, lenja, dao etc. He went 10/12 nals towards that direction and his statement is that Majan Mia, Abdul Jabbar, Mirazur and Samud were assaulting. He also had seen Indraj Ali fighting. He raised a cry "there is bichar". By this time the witnesses came by boat. Then the accused persons left the place before the witnesses came. Lakshyamani also came. He then went to the place of occurrence and found Ramesh and Rabindra lying in an injured condition. His evidence in cross-examination is that one could go to the place of occurrence from his land on foot. There was no water in between. He also admits that his land will be 100 yards away from the place of occurrence and middle plot was with growing paddy; even the plot of Gour Netai was with standing paddy. He however stated before the police during investigation that he could not go to the place of occurrence immediately as there was standing water in between his field and the place of occurrence. This statement has been proved through the investigation officer. He also had to admit in the course of his cross-examination that he could not state who hurt whom and at which part of the body. He admitted that he came along with Lakshyamani and he saw Lakshyamani going after the accused persons got up on the boat. The evidence which we have noticed above does not inspire any confidence. We are not satisfied that this witness saw the occurrence. He is in the same boat with Lakshyamani so far as the quality of evidence is concerned.

10. P.W. 9 was ploughing on his own land and saw two boats coming. Persons from one boat entered into the land of Ramesh Nath. 10/12 persons started fighting as soon as they entered the land. He recognised only Majan Mia among

those persons who were fighting. He recognised no other person. At this stage, the Public Prosecutor in the Court below was given permission to draw the attention of the witness to his earlier statement to the police to the effect that he had stated therein as recognising Abdul Jabbar, Rekman, Sattar and Mijazur. He then admitted that he did state to the police that he had recognised the above four persons as well. He gave no reason why he omitted to implicate these four persons and about his concentrating on Majan Mia. In absence of any satisfactory explanation, it is difficult to rely on the testimony of a witness who has no scruple to implicate any persons to his or somebody else's wish or liking in a serious charge of murder. We are, therefore, unable to rely on the testimony of P.W. 9.

11. We are now left with P.W. 10 who was another person who had land nearby and was said to have seen the occurrence from his land. He stated that there were 25/30 persons armed with lathi, lenja and dao. Ramesh and Rabindra have been hurt. He stated:

"I recognised four/five persons when they were boarding on the boat after fighting—they are Majan, Abdul Jabbar, Mijazur. I recognised these very three persons".

At this stage, the Public Prosecutor was allowed by the Court to draw attention of the witness to his earlier statement to the police and he denied that he had stated therein that Sattar, Sanjid, Kuti, Rekman and others had also fought. The character of his evidence is therefore of the same type as that of P.W. 9 and the reasons given for discarding the evidence of P.W. 9 equally apply to this witness. This witness has also no scruple to implicate persons indiscriminately in a murder charge.

12. In the result, the evidence of all the witnesses who have deposed to the occurrence is found to be unreliable, and we find it judicially unsafe to convict these three appellants on their testimony. It is true that one person has been killed and another received severe injury while defending their possession about which there is sufficient evidence. We have some justifiable suspicion that the case must have taken shape after some deliberation and that is the only reason why Junab Ali and others have vanished into thin air and other persons who may not have been there have figured prominently in the case. At any rate, the accused are entitled to the benefit of reasonable doubt in this case and they are acquitted of all the charges.

13. The appeal is allowed and the conviction and sentence of all the accused persons are set aside. Accused Majan

Mia shall be released from jail forthwith and the other two accused persons who are on bail shall be discharged from their bail bonds.

14. D. M. SEN, J.: I agree.

Appeal allowed

1970 CRI. L. J. 1330 (Vol. 76, C. N. 351) =

AIR 1970 BOMBAY 333 (V 57, C 55)

CHANDRACHUD AND GATI NE, JJ.

Sholapur Municipal Corporation and another, Petitioners v. Ramkrishna V. Relkar and another, Respondents.

Criminal Revn. Appln. No. 824 of 1967, D/- 15-2-1968.

(A) Municipalities — Bombay Provincial Municipal Corporations Act (59 of 1949), Sch. Chap. VIII, R. 29 (1) (d) — Offence of importing goods without paying octroi duty — Municipal Commissioner has no power to compound offence either under Criminal Procedure Code or under the Act — AIR 1954 Bom 427, Ref. (Para 7)

(B) Criminal P. C. (1898), Sch. II, second part — Offences against laws other than Penal Code — Are non-compoundable.

(Para 3)

(C) Municipalities — Bombay Provincial Municipal Corporations Act (59 of 1949), Section 481 (1) (b) — Power of Municipal Commissioner to compound offences under the Act — Extent of.

The power conferred by Sec. 481 (1) (b) is a qualified power and the nature of that power is that if an offence under the Act is capable of being compounded under any law, as for example, the Code of Criminal Procedure, the Commissioner may compound that offence. But if the offence cannot be legally compounded under any law for the time being in force, the Commissioner would have no power to compound the particular offence. (Para 4)

(D) Criminal P. C. (1898), Section 345 — Compounding offences — Scheme of section is that offences not specified in sub-sections (1) and (2) cannot be compounded in view of sub-section (7) of Section 345.

(Para 5)

(E) Municipalities — Bombay Provincial Municipal Corporations Act (59 of 1949), Section 393 — Section has nothing to do with composition of offences under Act — Question of compounding of offence has to be decided by reference to Sec. 481 (1) (b).

(Para 8)

(F) Criminal P. C. (1898), Sections 1 (2) and 5 (2) — Combined effect of.

The conjoint effect of Section 1 (2) and Section 5 (2), Criminal P. C. is that all offences, whether under Penal Code or under any other law, have to be investigated, in-

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quired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, unless there be an enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences in which case such an enactment will prevail over the Code of Criminal Procedure, and that the provisions of special or local law will prevail over those of the Code of Criminal Procedure unless there is a specific provision to the contrary. (Para 9)

Cases Referred: Chronological. Paras

(1954) AIR 1954 Bom 427 (V 41) =
56 Bom LR 264, Trikamdas Udeshi
v. Bombay Municipal Corpn. 11

Pragkash S. Shah, for Petitioners, Raghnendra A. Jahagirdar, Hon. Asstt. to Govt. Engineer, for State (Respondent No. 2).

CHANDRACHUD, J.: This revision application raises a question of some interest and importance. Stated briefly the question is whether the Commissioner for the Municipal Corporation of Sholapur has power to compound an offence committed by the 1st respondent under Rule 29 (1) (d) of Chapter VIII of the Schedule to the Bombay Provincial Municipal Corporations Act, 1949, (hereinafter called "the Act"). The 1st respondent brought a scooter within the limits of the Municipal Corporation on the 6th February 1967 without paying the octroi duty. On the 15th of March, 1967, the Municipal Corporation filed the present complaint against the 1st respondent, charging him of the offence of importing the scooter without the payment of duty. The Municipal Commissioner compounded the offence on the 29th of May 1967, presumably in the purported exercise of the power conferred upon him by the bye-laws of the Municipality. The 1st respondent then filed a pursis before the learned Magistrate that the offence was compounded and, therefore, the complaint should be disposed of after recording the composition. By his order dated 24th of July, 1967, the learned Magistrate has held that the Commissioner has no power to compound the offence and, therefore, the composition cannot be recorded. The correctness of this order is challenged in this revision application. The matter had come up for hearing before Wagle J. who has referred it to the Division Bench.

2. For a proper decision of the question whether the Commissioner has the power to compound the offence, it would be necessary to consider the relevant provisions of the Criminal Procedure Code and of the Act, Section 1, sub-section (2) of the Criminal Procedure Code provides, to the extent it is material, that in the absence of any specific provision to the contrary, nothing in the Code shall affect any special or local law for the time being in force. Section 5, sub-section (1) of the Code provides that all offences under Indian Penal Code shall be investigated, inquired into, tried and

otherwise dealt with according to the provisions of the Code. Sub-section (2) of Section 5 provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 345 of the Code which deals with composition of offences consists of seven sub-sections. Sub-section (1) provides for the composition of certain offences under the Indian Penal Code by the persons mentioned in the table. Sub-section (2) provides for the composition of certain other offences under the Indian Penal Code with the permission of the Court. Sub-section (7) provides that no offence shall be compounded except as provided by Section 345. Sub-sections (3) to (6) are not relevant for our purpose.

3. Two schedules were originally appended to the Code of Criminal Procedure, but the first schedule was repealed by Act No. X of 1914. The second schedule contains a Tabular statement of Offences and one of the columns of the Table, viz, Column No. 6, prescribes whether the particular offence is compoundable or not. The schedule can be roughly divided into two parts, the first part dealing with the offences under the Indian Penal Code and the second part with offences against laws other than the Indian Penal Code. The second part which is headed "Offences against other laws" provides in effect that no offence against any law other than the Indian Penal Code can be compounded. The second part deals with offences of four different categories. The first category relates to offences punishable with death, imprisonment for life or with imprisonment for seven years or upwards. The second category deals with offences punishable with imprisonment for three years and upwards but less than seven years. The third category deals with offences punishable with imprisonment for one year and upwards but less than three years. The fourth category deals with offences punishable with imprisonment for less than one year or with fine only. The sixth column in respect of all the four categories says that the offence is "not compoundable". All offences from those punishable with the sentence of fine only to offences punishable with the sentence of death are exhausted by the four categories of the second part of the second schedule and since such offences are made non-compoundable no offence against any other law, that is to say, a law other than the Indian Penal Code, is capable of being compounded. Now, turning to the provisions of the Act, S. 481 provides by cl (b) of sub-section (1) that the Commissioner may "compound any offence against this Act or any rule, regulation or by-law which under

the law for the time being in force may legally be compounded" Section 393 of the Act, which is the only other provision of the Act which requires to be noticed, provides briefly that contravention of certain provisions mentioned in the table contained in the section will amount to contravention of the corresponding sections of the Indian Penal Code as specified in the table.

4. It is urged by Mr. Shah, who appears on behalf of the petitioners, that the Municipal Commissioner has got the power to compound all offences under the Act, in view of the provisions contained in Section 181 (1) (b) of the Act. We find it impossible to accept this submission. The provision on which Mr. Shah relies says that the Commissioner may compound any offence against the Act if the offence may be legally compounded under the law for the time being in force. The very language of the provision shows that it was never intended to confer an absolute power on the Commissioner to compound any and every offence against the Act or against the rules, regulations or by-laws under the Act. The power conferred by Clause (b) of sub-section (1) of Sec. 181 is a qualified power and the nature of that power is that if an offence under the Act is capable of being compounded under any law, as for example, the Code of Criminal Procedure, the Commissioner may compound that offence. It is patent that if the offence cannot be legally compounded under any law for the time being in force, the Commissioner would have no power to compound the particular offence.

5. The real question, therefore, is not whether the Commissioner has got the power to compound the particular offence under clause (b), but whether as contemplated by that clause there is any law for the time being in force under which the offence may be legally compounded. The only other law which in this behalf would be relevant is the Code of Criminal Procedure. Now, in order to determine whether an offence of the present nature, viz., importation of the goods without the payment of octroi duty, can be legally compounded under the Code of Criminal Procedure, it is necessary to bear in mind the scheme of Section 345 of the Code. The scheme is that offences specified in sub-sections (1) and (2) can alone be compounded and that too by the persons who are specified in the sub-sections as being entitled to compound the offences. The additional limitation on the power of composition is that the offences specified in sub-section (2) of Section 345 can be compounded with the permission of the Court only. Under sub-section (7) of Section 345, no offence can be compounded except as provided by the section and, therefore, it is clear that the scheme of Section 345 is that offences which are not specified in any of the sub-sections of Section 345 cannot be compounded. The scheme of Section 345 is not that all offences

can be compounded except those which are specified. This aspect is important for the reason that, in view of the provisions contained in Section 345, an offence can be legally compounded under the Code only if the Code specifically provides that the offence can be compounded.

6. That takes us to the second part of the second schedule of the Code, the provisions of which have been set out by us already. It is clear from those provisions that no offence against a law other than the Indian Penal Code can possibly be compounded, because in respect of offences of all categories under the other laws the express provision made in column 6 of the second schedule is that the offences are "not compoundable".

7. It is thus clear that an offence against the Act, being an offence under any other law, cannot be legally compounded under the Code. Apart from the Code, there is no enactment permitting the composition of such offences and, therefore, it must follow that the Commissioner has no power to compound the offence.

8. Mr. Shah says that this construction would render clause (b) of Section 181 nugatory, for what is given by one hand shall have been taken away by the other. We do not agree with this submission. What clause (b) gives is itself a qualified power. The qualification subject to which the Commissioner may exercise his power to compound an offence is that the offence must be capable of being legally compounded under any law for the time being in force. The intention of the Legislature, therefore, was not to confer a blanket power on the Commissioner to compound offences of all kinds and types, but to retain intact his power, if any, to compound offences under any other law for the time being in force. As the power conferred by clause (b) is itself limited, it would, in our opinion, not be correct to say that to hold that the power is limited is to render nugatory the power itself. Mr. Shah has drawn our attention to Section 393 of the Act which provides that offences under certain sections of the Act, like Sections 194, 319 and 477, shall be deemed to be offences under Sections 277, 188 and 177 of the Indian Penal Code respectively. Now, the offences under these three sections of the Indian Penal Code are non-compoundable and the argument of Mr. Shah is that the Legislature has given in Section 393 a clue to its intention that all offences against the Act except offences against the sections mentioned in the table to sub-section (1) of Section 393 should be deemed to be compoundable. This interpretation, in our opinion, is too far-fetched. In the first place, Section 393 has nothing to do with the composition of offences and if Mr. Shah is right that sub-section (1) of that section furnishes any clue to the intention of the Legislature, such a clue could only be that offences under

the sections mentioned in the table are clearly not compoundable. There is nothing in Section 393 from which to infer that for the reasons that offences under certain sections of the Act have been equated with offences under certain sections of the Indian Penal Code which are non-compoundable, offences against other sections of the Act would become compoundable. Whether an offence under any of the sections of the Act is compoundable or not is a question which must be decided by reference to the language of Section 481 (1) (b) and that provision leaves no doubt that the power of the Commissioner to compound such an offence is subject to the qualification that the offence is capable of being legally compounded under any law for the time being in force. If this test is not satisfied and if this condition is not fulfilled, the Commissioner would have no power to compound the offence.

9. It is really not necessary, in view of the specific provision of Section 481 (1) (b) of the Act, to consider the implication of Section 1 (2) or Section 5 (2) of the Code of Criminal Procedure, but Mr. Shah has relied on those provisions also and we might, therefore, briefly discuss those provisions. Under sub-section (2) of Section 1, the provisions of the Code cannot affect the provisions of any special or local law unless there is any specific provision to the contrary. Under sub-section (2) of Section 5 offences under laws other than the Indian Penal Code are required to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, subject to any enactment regulating these matters. Now, the conjoint effect of these provisions is.—

(1) That all offences, whether under the Penal Code or under any other law, have to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code.

(2) This rule is subject to the qualification that in respect of offences under other laws, that is to say, under laws other than the Indian Penal Code, if there be an enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, such an enactment will prevail over the Code of Criminal Procedure, and

(3) The provisions of special or local law will prevail over the provisions contained in the Code of Criminal Procedure unless there is a specific provision to the contrary

10. Now, applying these principles, there can be no doubt that the Municipal Commissioner has no power to compound offences under the Act because by reason of the specific provision contained in the second part of the second schedule to the Criminal Procedure Code, such offences cannot be compounded at all. If there were a provision in the Act itself to the effect that the

offences under the Act could be compounded, it would have been possible to uphold Mr. Shah's argument that such a provision in the special law would prevail over the provision contained in the Code of Criminal Procedure. As we have, however, indicated earlier, the provision contained in Section 481 (1) (b) of the Act itself gives a place of precedence to the provisions contained in other laws, for what it says is that the Commissioner may compound offences under the Act if such offences can be legally compounded under any law for the time being in force. Thus, even if the provisions contained in Sections 1 (2) and 5 (2) of the Code of Criminal Procedure were taken into consideration, the same result would follow.

11. Before concluding, we might refer to a decision of Chief Justice Chagla in the case of *Trikamdas Udeshi v. Bombay Municipal Corpn*, 56 Bom LR 264, to which the learned Assistant Government Pleader has drawn our attention. A person who was found travelling by a tram-car in Bombay without a ticket was called upon by a Traffic Supervisor to pay a sum of Rs. 5/- by way of penalty, which was truly in the nature of composition. He paid the penalty and then filed a suit against the Bombay Municipal Corporation to recover the amount as having been paid under coercion. His contention was that the Municipality had no power to compound the offence, for the offences against the Bombay Municipal Corporation Act, 1888 were non-compoundable. The learned Chief Justice held that the offence which was committed by the plaintiff in travelling by the tram-car without purchasing a ticket was non-compoundable and that, therefore, the Traffic Supervisor had no power to compound the offence, with the result that the petitioner was entitled to recover the amount paid by him under the threat of prosecution. Now, the Bombay Municipal Corporation Act contains in Section 517 (1) (b) a provision analogous to that contained in Section 481 (1) (b) of the Act, and though the language of the two provisions is slightly different, the difference is without a distinction. It is true that the various provisions of the Criminal Procedure Code have not been referred to by the learned Chief Justice, but it is clear from the judgment that the power to compound offences under the relevant provision was not even canvassed.

12. The result may perhaps be unfortunate, for if the petitioner who had evaded the octroi duty is willing to pay the duty and a small penalty in addition, it would be possible to avoid subjecting him to the harassment of a criminal trial. It would, however, appear that under clause (a) of sub-section (1) of Section 481 of the Act, it is competent to the Commissioner to withdraw from the proceedings taken by him. If such an application is made by the Commissioner, we have no doubt that it would

office Sachidananda Banerjee, Assistant Collector of Customs and Mr. Banerjee argues that Sachidananda Banerjee, although successor in office as Assistant Collector of Customs, is not the complainant within the meaning of sub-clause (3) of Section 417 of the Criminal P. C., and as such, this appeal is not competent. Mr. Banerjee has also argued on merits and supported the view taken by the appellate Court.

Before we take up the preliminary point, we propose to deal with the merits of the case viz., whether the respondent had the record player as part of his baggage while travelling by air from Singapore. Recovery of the diamonds has not been challenged and has been proved by the evidence of a number of responsible witnesses. On this point two important pieces of evidence are the testimony of P. W. 8, Mrs. Grey, employee under B. O. A. C. who actually escorted the respondent to the customs enclosure for examination of the baggages and the respondent's own admission in the baggage declaration inventory Ex. 2, where he claims the Record player purchased at Singapore as his baggage. Mrs. Grey stated in her evidence that respondent disembarked from Qantas plane and was carrying the record player Ex. II himself while a porter was carrying his suitcase, Ex. I. She took him to the custom's enclosure for examination of baggages and the inventory was signed by her. In cross-examination she asserted that the respondent did not carry any hand bag with him when she conducted him and that he was carrying a record player. Evidence of P. W. 8 finds corroboration from the evidence of P. W. 1; Mr. Lobd, Preventive Officer, Customs House, Calcutta. He stated that when respondent came to Customs House, he supplied him with the declaration form Ex. 2 and the respondent himself filled it up. He was then asked by the Air Port Inspector Marcelline to search the baggage and he did it in presence of two witnesses, Mrs. Grey and Panna De, besides Mr. Marcelline. He searched the suitcase Ex. I and then the record player Ex. II, which was locked. He opened it with a key supplied by respondent and suspected a false bottom. On removing the venesta wood floor, he found 261 wrist watches. A search list was prepared and the respondent also signed it. He denies that the record player was foisted on him or that he did not supply the key with which it was opened. He also stated that tag was attached to Record player and not to the Hand-bag. This witness is also corroborated by P. W. 2, P. De, who told that the record player was opened with a key supplied by the respondent. The upper lid was opened with screw driver and the plate gave way leading to recovery of 261 watches. He also told that Ex. 4 inventory was written in his presence and signed by the respondent. He mentions a suitcase and a leather handbag, the latter was hand-

ed over to respondent after search. P. W. 4 Marcelline is the Airport Inspector at Dum Dum Airport and he told P. W. 1 Lobo to take a declaration, and search the baggages of respondent and he was present during search. He stated that respondent had three packages with him and he identified Exs. I and II, suitcase and record player. The handbag was returned to respondent at the airport. He also corroborates other witnesses that respondent opened the Record player with key in his possession and then he describes how the wrist watches are recovered after removal of venesta floor. He denies that the respondent had only 2 packages with him and he is definite that the record player was with him and he saw him coming with it. He denies the suggestion that the baggage declaration form was filled and obtained from respondent at the Customs House or that he did not produce the key with which the Record player was opened. He was retired when he deposed and there is no reason for him to falsely depose.

8. Prosecution also examined other witnesses to prove the search and the seizure list and they also stated that respondent signed the seizure list. Apart from the oral evidence, the declaration form clearly shows that the record player, purchased by him at Singapore was part of his baggage and the plea that this declaration was taken from him later at the Customs House under threat is unbelievable. The learned Judge was conscious that it was very valuable evidence against him but he felt that, "there are certain points in this case which lead to the conclusion that no conviction can be made only on this declaration form", forgetting that there was unimpeachable oral evidence that he was carrying this record player while disembarking from the plane and that he produced the key with which it was opened. It is true that the learned Magistrate, while examining the respondent under Section 342, Criminal P. C., did not draw his attention to this declaration form but then there was thorough cross-examination of different witnesses on this point and it was suggested that it was taken from him under threat at the Customs House. The explanation was therefore on record and the learned Magistrate considered the defence suggestion and rejected it. There is therefore no question of any prejudice to defence in the absence of a specific question on the point and the learned Judge is not right in holding that respondent was deprived of the opportunities to give any explanation. The second point accepted by the learned Judge in favour of appellant is the delay in producing the respondent before Magistrate after arrest. The plane touched airport at about 3 P. M., then was the search in the customs enclosure in the manner already discussed and the respondent was put under arrest at 4.30 P. M. and taken to Customs House between 4.30 P. M. and 5 P. M. Search list Ex. 3 shows search completed at

be dealt with on the merits by the learned Magistrate. We might also draw attention to the observations made by Chief Justice Chagla in the case referred to above that practical difficulties which the Corporation may face by reason of the absence of powers to compound offences under the Act 'should be got over not by resorting to powers which the Municipality does not possess, but by the necessary amendment of the law.'

13. In the result, we confirm the order passed by the learned Magistrate and discharge the rule in this petition.

Rule discharged.

1970 CRI. L. J. 1333 (Vol. 76, C. H. 352) =

AIR 1970 CALCT 1 FA 128 (V 57 C 86)

DAS AND K. K. MITRA, JJ.

Sachidananda Banerji, Appellant v. Motichand Verma, Respondent.

Criminal Appeal No. 715 of 1961, D/- 7-8-1969

(A) Criminal P. C. (1898), S. 423 — Appeal from acquittal — Appreciation of evidence.

The powers of High Court in an appeal from acquittal are in no way different from those in appeal against conviction. The High Court can consider the evidence and weigh the probabilities. It can accept the evidence rejected by the lower Court and reject the evidence accepted by it, unless the lower Court relied on demeanour. High Court however will pay due attention to the grounds on which acquittal is based and reject these grounds satisfactorily.

(Para 13)

(B) Criminal P. C. (1898), Section 417 (3) — Bench admitting appeal granting leave presumably on being satisfied that successor in office was complainant within meaning of Section 417 (3) — Issue cannot be re-opened at time of hearing.

(Para 17)

(C) Criminal P. C. (1898), S. 417 (3) — 'Complainant' — Meaning of — Successor-in-office is 'complainant' — Criminal Appeal No. 779 of 1965 (Cal), Dissented.

The word 'complainant' in Section 417 is not used in any restrictive sense and successor-in-office of an officer is also the complainant within the meaning of Section 417, sub-section (3) and is equally competent to file the appeal. AIR 1961 SC 1, Rel. on; AIR 1964 Cal 64 (65) and AIR 1967 Cal 442 and Criminal Appeal No. 429 of 1961 (Cal), Disting. Criminal Appeal No. 779 of 1965 (Cal), Dissented from.

(Para 18)

(D) Sea Customs Act (1878), Section 167 (81) — Punishment — Watches smuggled in India secretly under wooden plank of record player — Deterrent punishment is necessary.

(Para 24)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1412 (V 54) =

1967 Cri LJ 1213, Sheo Singh v. State of U. P. 13

(1967) AIR 1967 Cal 412 (V 50) =

1967 Cri LJ 1135, Monmatha Path Halder v. Narayan Mondal 21

(1965) Criminal Appeal No. 779 of

1965 (Cal), Chairman Raising

Municipality v. H. Agarwalla 21, 22

(1964) AIR 1964 Cal 64 (V 51) =

1964 (1) Cri LJ 186, Nam

Samanta v. Robin Ghosh 21

(1962) Criminal Appeal No. 10 of

1962 (Cal), Namal Samanta v.

Robin Ghosh 21, 22, 23

(1961) AIR 1961 SC 1 (V 15) =

1961 (1) Cri LJ 170, Vasanlal

Mazumdar v. State of Bombay 23

(1961) Criminal Appeal No. 129 of

1961 (Cal), Jugal Kishore v. Syama-

charan 21, 22

Befay Bhose, for Appellant; N. C. Banerjee

and Jaharlal Roy, for Respondent.

DAS, J.: This is an appeal against an order of acquittal passed by a learned Additional Sessions Judge, setting aside the order of conviction passed by a learned Magistrate, Alipur.

2. The prosecution case is as follows:

3. On June 19, 1959 at about 3 P. M. the respondent Moti Chand Verma arrived at Dum Dum Airport by Quantas Aircraft as a passenger from Singapore. For customs checking, he was taken to the customs enclosure, where the belongings were searched by the customs staff. During the search, the customs officers found that there was false bottom in the record player in his possession. This was opened and underneath was found concealed 261 wrist watches, valued at about Rs. 7630, for which 100% duty was chargeable. A complaint was filed in Court against him by the Assistant Collector of Customs and he was convicted under Section 167 (81) of the Sea Customs Act.

4. The defence was a plea of innocence, upon denial that he was carrying the record player with him. He alleged that the record player was foisted upon him by the customs officers.

5. There was an appeal against the order of conviction and the learned Additional Sessions Judge found that prosecution failed to prove that the record player was part of his luggage and he therefore set aside the order of conviction and acquitted him. This appeal is directed against the order of acquittal.

6. At the outset, Mr. N. C. Banerjee learned Advocate for the respondent raised a preliminary point of objection regarding maintainability of the appeal, as the right to appeal against an order of acquittal is available to the complainant only. The complainant, before the Magistrate was R. C. Misra, Assistant Collector of Customs and this appeal is filed by his successor in

office Sachidananda Banerjee, Assistant Collector of Customs and Mr. Banerjee argues that Sachidananda Banerjee, although successor in office as Assistant Collector of Customs, is not the complainant within the meaning of sub-clause (3) of Section 417 of the Criminal P. C., and as such, this appeal is not competent. Mr. Banerjee has also argued on merits and supported the view taken by the appellate Court.

7. Before we take up the preliminary point, we propose to deal with the merits of the case viz., whether the respondent had the record player as part of his baggage while travelling by air from Singapore. Recovery of the diamonds has not been challenged and has been proved by the evidence of a number of responsible witnesses. On this point two important pieces of evidence are the testimony of P. W. 8, Mrs. Grey, employee under B. O. A. C. who actually escorted the respondent to the customs enclosure for examination of the baggages and the respondent's own admission in the baggage declaration inventory Ex. 2, where he claims the Record player purchased at Singapore as his baggage. Mrs. Grey stated in her evidence that respondent disembarked from Quantas plane and was carrying the record player Ex. II himself while a porter was carrying his suitcase, Ex. I. She took him to the custom's enclosure for examination of baggages and the inventory was signed by her. In cross-examination she asserted that the respondent did not carry any hand bag with him when she conducted him and that he was carrying a record player. Evidence of P. W. 8 finds corroboration from the evidence of P. W. 1, Mr. Lobd, Preventive Officer, Customs House, Calcutta. He stated that when respondent came to Customs House, he supplied him with the declaration form Ex. 2 and the respondent himself filled it up. He was then asked by the Air Port Inspector Marcelline to search the baggage and he did it in presence of two witnesses, Mrs. Grey and Panna De, besides Mr. Marcelline. He searched the suitcase Ex. I and then the record player Ex. II, which was locked. He opened it with a key supplied by respondent and suspected a false bottom. On removing the venesta wood floor, he found 261 wrist watches. A search list was prepared and the respondent also signed it. He denies that the record player was foisted on him or that he did not supply the key with which it was opened. He also stated that tag was attached to Record player and not to the Hand bag. This witness is also corroborated by P. W. 2, P. De, who told that the record player was opened with a key supplied by the respondent. The upper lid was opened with screw driver and the plate gave way leading to recovery of 261 watches. He also told that Ex. 4 inventory was written in his presence and signed by the respondent. He mentions a suitcase and a leather handbag; the latter was hand-

ed over to respondent after search. P. W. 4 Marcelline is the Airport Inspector at Dum-dum Airport and he told P. W. 1 Lobo to take a declaration, and search the baggages of respondent and he was present during search. He stated that respondent had three packages with him and he identified Exs. I and II, suitcase and record player. The handbag was returned to respondent at the airport. He also corroborates other witnesses that respondent opened the Record player with key in his possession and then he describes how the wrist watches are recovered after removal of venesta floor. He denies that the respondent had only 2 packages with him and he is definite that the record player was with him and he saw him coming with it. He denies the suggestion that the baggage declaration form was filled and obtained from respondent at the Customs House or that he did not produce the key with which the Record player was opened. He was retired when he deposed and there is no reason for him to falsely depose.

8. Prosecution also examined other witnesses to prove the search and the seizure list and they also stated that respondent signed the seizure list. Apart from the oral evidence, the declaration form clearly shows that the record player, purchased by him at Singapore was part of his baggage and the plea that this declaration was taken from him later at the Customs House under threat is unbelievable. The learned Judge was conscious that it was very valuable evidence against him but he felt that, "there are certain points in this case which lead to the conclusion that no conviction can be made only on this declaration form", forgetting that there was unimpeachable oral evidence that he was carrying this record player while disembarking from the plane and that he produced the key with which it was opened. It is true that the learned Magistrate, while examining the respondent under Section 342, Criminal P. C., did not draw his attention to this declaration form but then there was thorough cross-examination of different witnesses on this point and it was suggested that it was taken from him under threat at the Customs House. The explanation was therefore on record and the learned Magistrate considered the defence suggestion and rejected it. There is therefore no question of any prejudice to defence in the absence of a specific question on the point and the learned Judge is not right in holding that respondent was deprived of the opportunities to give any explanation. The second point accepted by the learned Judge in favour of appellant is the delay in producing the respondent before Magistrate after arrest. The plane touched airport at about 3 P. M., then was the search in the customs enclosure in the manner already discussed and the respondent was put under arrest at 4.30 P. M. and taken to Customs House between 4.30 P. M. and 5 P. M. Search list Ex. 3 shows search completed at

4.30 P. M. And he was produced before the Magistrate on the next date. We do not see any delay in production before Magistrate in violation of the statutory provisions, so as to draw any inference that the declaration was taken at the Customs House under threat or by force and there is clear evidence from Airport officers that the baggage declaration form was filled up and signed before search.

9. The learned Judge has pointed out that the respondent had one registered and another unregistered package according to the ticket and baggage check and no record player and he therefore discredits the evidence regarding the record player, obviously holding the handbag as the unregistered package. This was considered by the learned Magistrate who held that the record player, in view of the evidence on record, was carried as an unregistered baggage, in avoidance of rules Ex VI, ticket and baggage check does not show the number (Pieces) of unregistered baggages but shows merely the weight. P. W. 8 stated that packages weighing less than 5 lbs. are carried by passengers themselves as unregistered baggage. Weight of the unchecked baggage is 4 kg which is 8.8 lbs. and the learned Magistrate points out that the weight points to the existence of more than 1 package. Any passenger smuggling prohibited goods would obviously attempt to avoid detection, and preplan for the purpose of a handbag and record player coming as one unregistered package is not such an improbability as to undo the oral evidence from so many responsible officers at the airport and the statement of the passenger in his own declaration, Ex. 2 at the airport before search.

10. The learned Judge has referred to the non-production of the key but the key was not seized at all. The learned Judge has referred to absence of any tag with the record player and has concluded that the accused was not in possession of the record player. The conclusion is obviously unwarranted, as the record player is a baggage brought in the plane. All that the respondent contends is that he did not bring it but there is no doubt it came by the plane without a tag and absence of a tag does not lead to the conclusion that respondent did not bring it. It contained smuggled watches and hence meticulous care was taken to avoid detection and this explains absence of the tag, just as there was avoidance of mentioning the third package, namely, the handbag. The learned Judge referred to non-production of the manifest and drew adverse inference, forgetting the evidence that the manifest does not disclose the weight of the package. P. W. 4 Marcelhine made it clear that no Airlines except that of Thailand and Union of Burma showed number of packages and their weights in the manifest. Prosecution therefore had no occasion to produce the manifest and there is no scope for drawing adverse presumption.

11. Referring to weight, the learned Judge held that the weight of a record player like Ex. II would be more than 28 lbs. No weights were taken and we do not know how the learned Judge came to take this view on appeal.

12. The evidence that the respondent was carrying the record player is overwhelming, this evidence is further strengthened by the baggage declaration at the Customs in the Airport before search and there is no scope for any doubt, far less reasonable doubt—that the record player was brought by the respondent from Singapore and 261 watches were kept concealed in it underneath a false venesta wood floor.

13. We are not unmindful that this is an appeal against acquittal—that the respondent had not only the initial presumption of innocence but having been acquitted on appeal by the Sessions Judge this presumption was reinforced. In the case reported in AIR 1967 SC 1412, *Sher Singh v. State of U. P.*, the learned Judges pointed out that the powers of a High Court in an appeal from acquittal are in no way different from those in appeal against conviction. The High Court can consider the evidence and weigh the probabilities. It can accept the evidence rejected by the lower court and reject the evidence accepted by it, unless the lower Court relied on demeanour. High Court however will pay due attention to the grounds on which acquittal is based and repel these grounds satisfactorily. We have pointed out during the discussion of the evidence that the appellate Court's approach to evidence was perverse and that he drew presumption in law where none was available. The evidence regarding the appellant's possession of the record player is overwhelming and a different conclusion is not possible on the evidence on record.

14. The learned Judge's order acquitting the respondent should therefore be set aside and the order of conviction passed by the learned Magistrate restored.

15. We may now consider the point of law raised by Mr. Banerjee regarding the admissibility of the appeal. The complaint initiating the proceeding was filed by R. C. Misra, then Assistant Collector of Customs on November 7, 1959 and the Magistrate convicted respondent by an order dated June 28, 1961. There was an appeal against order of conviction and the learned Judge acquitted the respondent by an order dated August 8, 1961. By this time, R. C. Misra was transferred and this appeal was filed by his successor in office, Sachidananda Banerjee on November 18, 1961. Special leave to appeal was applied for and granted by the Court. Mr. Banerjee, learned Advocate for respondent has submitted that right to appeal under Section 417, Criminal P. C. on special leave is open to the complainant alone and the appellant being somebody other than R. C. Misra, this is incompetent. His argument is that sub-section (3) of Sec-

tion 417 enables the High Court to grant special leave on the application of the complainant and therefore no leave can be granted, on application of Sachidananda Banerjee, as he is not the complainant in the case.

16. Sub-section (3) of Section 417, Criminal P. C. reads as follows:—

“417 (3). If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.”

17. This provision was enacted by the amendment of 1955 (Act 26 of 1955). This sub-section read with sub-section (5) provides for an appeal against acquittal only in cases where special leave to appeal is granted. Paragraph 5 of the petition for leave mentions that R. C. Misra has since been transferred elsewhere out of Calcutta and therefore this application for leave is prayed for by his successor in office, Banerjee. Leave was granted by the Bench admitting the appeal in 1961, presumably on being satisfied that Banerjee, as successor in office, was the complainant within the meaning of sub-section (3) of Section 417, Criminal P. C. and was competent to ask for special leave to file appeal. There is therefore no scope for reopening the issue by this Court again.

18. We are also of the view that the word ‘complainant’ in Section 417, Criminal P. C. is not used in any restrictive sense and that where the statute provides for complaint by a public servant with the sanction of his superior officer, as a condition precedent to cognisance by a Magistrate, it is the public office that counts and the successor-in-office of that officer is also the complainant within the meaning of Section 417, sub-section (3), Criminal P. C. and is equally competent to file the appeal. There is good deal of difference between a private complaint and complaint by a public servant under the provisions of a statute. The complainant in the latter case is really the office and not the individual and the individual comes into the picture only because the office speaks through the individual. To take a very rigid view of the word complainant by restricting it to the same individual is to take an absurd, unreal and unworkable view, and it does not help the cause of justice. A criminal proceeding almost always takes several years, including often two appeals and if this rigid view prevails, no appeal against acquittal will lie where the holder of the office retires or dies or is transferred. It is absurd to suggest that the office remains but the officer retires or is transferred and carries away with him the right of appeal. Equally absurd would be to hold that though retired, or transferred and not the holder of the office, he still preserves the right to appeal, even though only

the holder of the office is competent to file the complaint.

19. Section 187A provides for cognisance by a Magistrate on the complaint of the Chief Customs Officer or by any Assistant Collector of Customs, authorised by him. The authority granted is Ex. 7 and the authority comes from the Chief Customs Officer to the Assistant Collector of Customs, incidentally to R. C. Misra, as he happened to be the Assistant Collector. So long therefore the office remains, it is the holder of the office, who becomes the complainant and the appeal by Banerjee, Assistant Collector, is competent.

20. Mr. N. C. Banerjee, learned Advocate for the respondent submits that the word ‘complainant’ within the meaning of Section 417 (3), Criminal P. C. is the man who sets the law in motion and therefore the successor-in-office is not the complainant—the statute authorising complaint by a person authorised by the Chief Customs Officer means the person who filed the complaint and not anybody else, including the successor.

21. In support of this view Mr. Banerjee has referred to a decision reported in AIR 1964 Cal 64 at p 65, Nani Lal Samanta v. Rabin Ghosh, corresponding to Criminal Appeal No. 10 of 1962, Nani Lal Samanta v. Rabin Ghosh, AIR 1967 Cal 442 and unreported decision in Criminal Appeal No. 429 of 1961 (Cal), Jugal Kishore v. Syamacharan and Criminal Appeal No. 779 of 1965 (Cal). In Nani Lal Samanta's case, AIR 1964 Cal 64, A C Ray J. pointed out that the word ‘complainant’ means the person who was examined as complainant under Section 200 and none else is so, however much he is interested in the prosecution. In view of the provisions of Section 417 (3), if the complainant dies before presentation of the appeal, no other person, not even his legal heirs, may have that right. The same view was taken in Jugal Kishore's case, Criminal Appeal No. 429 of 1961 (Cal), and in the reported decision in AIR 1967 Cal 442 where it was pointed out that there is no inherent right of appeal against acquittal on special leave. These are decisions where the complainant is a private party, whose examination under Section 200, Criminal P. C. was essential and where question of sanction did not arise. They are therefore no authority for the proposition that where a complaint is required to be filed by a public servant with sanction from his superior, upon retirement, death or transfer of the officer, his successor in office is incompetent to appeal, not being a complainant within the meaning of Section 417 (3), Criminal P. C.

22. Criminal Appeal No. 779 of 1965 (Cal), Chairman, Raigunge Municipality v. H. Agarwalla, is another single Bench decision where also the learned Judge relied on Criminal Appeal No. 10 of 1962 (Cal) and

Criminal Appeal No. 429 of 1961 (Cal), and held that no extended meaning can be given to the word 'complainant', so as to enable any other person, however interested he may be in the prosecution of the accused and further there was no right to present such an appeal in the legal representative of a deceased complainant. It was further held that the successor in interest of a complainant is not a complainant within the meaning of the terms of Section 417 (3) of the Criminal Procedure Code. That was a decision where the Chairman of a Municipality filed the appeal after the Administrator ceased to function and the learned Judge also found that the Chairman of the Municipality is not a successor in interest of the Administrator. This decision unfortunately failed to give due importance to the fact that the complainant in these earlier cases were private parties and that the instant complaint was filed by a public officer under provisions of Section 187 (a) under authority of the Chief Customs Officer and that no Court could take cognizance unless the complaint was under such authority.

23. In the instant case R. K. Misra filed this complaint under the authority of the Chief Customs Officer and by the time this matter was heard in appeal, R. K. Misra was transferred and Sachidananda Banerjee took charge as Assistant Collector of Customs. By virtue of the provision of Section 187 (a) of the Sea Customs Act it is the holder of public office who is authorised to lodge the complaint and no cognizance shall be taken by a Magistrate unless the holder of this authority lodges the complaint. It is not R. K. Misra or Sachidananda Banerjee who is competent to file the complaint and it is the office they hold that authorises them to lodge the complaint. Proviso (aa) of Section 192, Criminal P. C. provides that where the complaint is made by a Court or by a public servant purporting to act in the discharge of his official duties, it is not required to examine the complainant. There is no doubt that the Chief Customs Officer or the Assistant Collector of Customs is a public servant and their examination under Section 192 is not necessary nor has R. K. Misra been examined in the instant case. This makes fundamental difference between a private complaint and a complaint by a public servant and the cases relied on by Mr. Banerjee except Criminal Appeal No. 10 of 1962 (Cal) deal with private complainants where on the death of such complainants their heirs filed an appeal against acquittal. Those decisions, therefore, are no authority for the proposition attempted to be propounded by Mr. Banerjee. The provision of the Sea Customs Act authorises the holder of the office to lodge a complaint and it is of little importance who is the person holding that office. Therefore, on the transfer of such officer the present incumbent is the 'complainant' under the provisions of Sec 417

(3), Criminal P. C. The Act provides for authority from the Chief Customs Officer and the authority really is given to the holder of the office and therefore, on the transfer of the officer, his successor in office is competent to file the complaint or file the appeal and it cannot be said that he is not competent to file the appeal. A similar point was considered by the Supreme Court in State of Bombay v. Parshotam Kamnabhai reported in AIR 1961 SC 1, in connection with sanction for prosecution under the P. F. A. Act. Section 20 of the Act provides that no prosecution under this Act shall be instituted except by or with the written consent of the State Government. The High Court held that the written consent did not in terms mention the person in whose favour the sanction or written consent was given. Supreme Court held that the consent is for launching a prosecution and not 'in favour' of a complainant authorising him to file the complaint. Emphasis is on the consent for filing the complaint, not on the person filing it. It was also held that "the specification of the name of the complainant is not a statutory requirement—the consent being to a specified prosecution." The reason behind this provision for 'consent' is apparent, viz., the authority competent to initiate proceeding should apply its mind to the facts and satisfy itself that a *prima facie* case exists for prosecution. This authorisation is therefore for a specified prosecution and specification of the name of the complainant is not a statutory requirement and the provision for appeal by the complainant in such cases of public servant covers cases of successor to the complainant holding the office. This objection must therefore be overruled. It is well known that sometimes a complaint with its appeal takes a fairly long time and by that time the public servant may either be transferred or may retire or even die. It is unthinkable that a retired officer would be asked to file the appeal under Section 417 (3), it is equally unthinkable that the officer who has been transferred and often diverted to another kind of job would be asked to come over for filing the appeal. We wonder if in such a case, objection against the competence to file appeal may not be taken, as the person is no longer in office as holder of the office. This objection, therefore, is overruled. We hold that Sachidananda Banerjee, Assistant Collector of Customs is competent to file this appeal and leave to appeal has already been granted to him.

24. We have already found that the view taken by the learned Sessions Judge is untenable and that there is clear evidence that the respondent committed the offence. We have found that the evidence against appellant is overwhelming and also that the learned Judge's approach is perverse and the grounds advanced for an order of acquittal are palpably wrong. This is a case where watches were smuggled into India secretly under the wooden plank of a record

player and the respondents therefore deserve deterrent punishment

25. We, therefore, set aside the order of acquittal and restore the order of conviction and sentence passed by the learned Magistrate. The respondent is sentenced to rigorous imprisonment for three months.

26. K. K. MITRA, J.: I agree.

Order accordingly.

1970 CRI. L. J. 1339 (Vol. 76, C. N. 358) =

AIR 1970 CALCUTTA 435 (V 57 C 82).

A. K. DAS AND K. K. MITRA, JJ.

Corporation of Calcutta, Appellant v. P. C. Rathī and Co. and another, Respondents.

Criminal Appeals Nos. 655 and 656 of 1963, D/- 13-8-1969.

Prevention of Food Adulteration Act (1954), Section 10 (1) — Enumeration in Section 10 of circumstances under which sample can be taken is not exhaustive — Seller leaving the shop on the approach of Food Inspector — Shop under watch by Police — Sample taken in the absence of seller from shop and godown of seller but following the prescribed procedure — Sample does not cease to be one within the meaning of S. 10 (1) and S. 2 because there was none to accept price — Shop continued to be in seller's possession though under police guard — Sample found adulterated — Seller is punishable under Sections 7 and 16. (Paras 11, 13)

N. C. Banerjee, for Appellant; Jahailal Roy, for Respondent

DAS, J.: Criminal Appeals Nos. 655 and 656 of 1963 arise out of two orders of acquittal by a learned Presidency Magistrate under the Food Adulteration Act. The respondents are common and decisions are based on common point.

2. In Criminal Appeal No 656 of 1963, the prosecution case is that on December, 5, 1962 the Food Inspector of the Calcutta Corporation went to the godown of the accused P. C. Rathī at 8, Banstolla Lane and wanted to take samples of ghee from stock in the shop and the godown at the back of the shop. He found P. C. Rathī, respondent but he denied that the shop belonged to him and contended that the godown was an order-supplying concern, not connected with ghee business. Thereafter, respondent disappeared and could not be found. Police was posted and with the Magistrate's permission to break open the locks, the Food Inspector went to the shop at 5 p. m. on the next date and sealed the padlock. Next day i. e. 7-12-62, at about 2 p. m., he went with the Enforcement Police and in presence of witnesses, broke the padlock and opened the door of the godown at the rear of the shop. He found

a name plate P. C. Rathī affixed on the door leaf of the godown. He seized big galvanised drums, copper vessel with tap, stoves and other implements for boiling, including a pot containing yellow colour and made a seizure list. He also found several tins of lotus brand Dalda and took samples under the Rules, after affixing a copy of the notice. One of the samples was sent to Public Analyst who found the ghee highly adulterated.

3. In case No 11-D a similar raid was carried out on the same date in the same firm's godown on the ground-floor of 17, Banstolla Road. The godown was under lock and key and the respondent P. C. Rathī could not be found out. Policemen were posted at the request of the Food Inspector and he also stayed there for the night. Next day, permission from the Magistrate was taken to break open the lock. On 7-12-62, he broke open the lock in presence of 2 witnesses and policemen and seized 8 tins, 17 seers each, in wooden boxes wrapped with gunny and on the gunny was written "To P. C. Rathī Howrah" in ink. He took several samples under the Rules — and sent one sample to Public Analyst who found it highly adulterated.

4. Thereafter sanction was obtained in both cases and complaints were filed.

5. Defence in either case is that the sample was not legally taken nor was it proved to be taken from the possession of the respondent and that it was not also proved to be adulterated.

6. The learned Magistrate found that the sample was highly adulterated but was not proved to be either legally taken or taken from possession of the respondent. He therefore, acquitted the respondents.

7. The Public Analyst found that the sample did not conform to the standard in respect of B R reading, Reichert value and Baudouin Test, due to the presence of excessive amount of foreign fat, containing sesame oil. On this report, the learned Magistrate was justified in holding that the samples were highly adulterated.

8. The learned Magistrate however found that the sample seized in the absence of the seller is not a sample within the meaning of Section 10 (1) of the P. F. A. Act and therefore, the Public Analyst's report does not form the basis for a prosecution. The learned Magistrate has held that at every stage of taking sample, the presence of the seller or any person on his behalf is a pre-requisite for taking sample. As the seller or anybody on his behalf was not present at the time of taking sample, the quantity of ghee taken by the Food Inspector is no sample within the meaning of Section 2 of the Act. He also held that where the sample was taken, the premises were under police guard and as such, it was in possession of the police and not of the respondent.

9. Food Inspector was examined as the principal witness in either case and his evidence has given a clear picture how the respondent Sethi avoided his presence and how he slipped away and how in spite of serious attempt he could not be contacted. The premises were thereafter sealed and then opened with order from the Magistrate and samples were taken in presence of witnesses and police, after observing the formality laid down in the Act. Sample is defined in Section 2 and it means a sample of any article of food taken under the provisions of this Act or of any rules made thereunder. Evidence has disclosed that the godown at S. Banstolla Lane and that at ground-floor of 17, Banstolla Road were godowns of P. C. Sethi & Company, respondent No. 1. On the dam leaf of the godown at No. 8, was affixed a name plate 'P. C. Sethi'. The witness also stated that previously he collected sample from the shop of respondent No. 1 and he was convicted under Food Adulteration Act. This witness further says that when he entered the shop at No. 8, P. C. Rathii was found inside the shop. Rathii's defence at the time was that though the trade license was in his name, it was an order-supply concern. The existence of the trade license in his name supports the view that he is the owner of the shop and godown. P. W. 3 Assistant of the license department, Calcutta Corporation also proves that P. C. Rathii holds the profession license at premises No. 8, and that he paid trade license fee for 1962. P. W. 3 police officer stated that a crowd gathered and while he was trying to disperse the crowd, Sethi made himself scarce. In respect of No. 17, P. W. 1 stated that he came to know on the 5th that the shop belonged to P. C. Rathii and the godown belonged to Rathii and Co. P. W. 3 is son of the owner of premises No. 17 and they resided on the 3rd floor. He stated that the godown on the ground floor belonged to Tara-chand and Company, of which the proprietor is P. C. Rathii. Ex. 10 is the petition of P. C. Rathii to Rent Controller where he describes himself as proprietor of Tara-chand & Company which is a tenant in respect of the godown room on the ground floor of premises No. 17, Banstolla Gully. There is therefore, no doubt that the shops and godowns belonged to M/s Rathii & Company, of which the proprietor is P. C. Rathii, respondent No. 1.

10. The learned Magistrate referred to Section 10 and held that the sample taken is not a sample contemplated under Section 10, as it was taken in the absence of the proprietor or seller and at a time when they were not in possession, as the shop and godown were in possession of police. The shop or godown was never in possession of the Police; the owner Sethi slipped away and therefore, the shop and the godown were sealed and kept under Police guard, till the lock was broken in presence

of witnesses under order of the Magistrate. The possession in effect remains with the owner, though it is under police watch and guard and this does not mean transfer of possession either in law or in fact to the police. The seizure was therefore, from the shop or godown in possession of the owner and the learned Magistrate is wrong in holding otherwise.

11. The provision of Section 10 regarding taking sample is again misconstrued by the learned Magistrate. This is an enabling section but for which, the seller or the consignee might refuse to sell or allow the Food Inspector to take sample. The section begins with "Powers of Food Inspector" and it empowers the Food Inspector to take samples from the seller from the person who is in course of conveying, delivering or preparing to deliver such article to a purchaser or consignee, and also from the consignee after delivery of any such article to him. The section is not restrictive of the powers of the Food Inspector and it only enumerates certain circumstances in which samples may be taken from different persons. This enumeration is not exhaustive nor does it in any way operate as a restriction on the power of the Food Inspector to take a sample, which is the object of this provision. Where therefore, sample is taken under the Rules from the stock in possession of the proprietor, it does not cease to be a sample merely on the ground that the proprietor or seller slips away on approach of the Food Inspector or that there is none to accept the price. These provisions are to ensure that the seller gets price of the sample and that samples are taken from the stock in his possession but by running away, the proprietor or seller does not take away the right to take samples for examination and prosecution. This provision is an enabling one, making the demand for sample legal. The provision for taking sample from seller is directory and not mandatory and it does not purport to restrict the power of the Food Inspector to take sample in such contingencies. The fact that price could not be paid, as none was there to receive does not change its character as a sale, for offer to pay price remains and credit sale is also a sale.

12. The provision for taking sample in presence of the seller was for the benefit of the seller, but was never intended to be utilised by a dishonest seller by running away and law will not allow him to take advantage of that dishonest move.

13. Facts in this case are glaring. The Food Inspector called at the shop or godown. The respondent No. 2 engaged him in conversation and then gave slip in one case locking up the shop. But in either case he was not found to be available. What happened therefore, has been dealt with by the learned Magistrate. In one case sample was taken in presence of the witnesses and in the other case, the shop was sealed and

then broken open under the order of a Magistrate and thereafter sample was taken and in either case the sample of ghee was found to be highly adulterated. It is clear that the respondent No. 2 played dirty trick and therefore, he cannot be permitted to take advantage of the dirty trick. The primary object of the provision for taking sample is to see that the sample is taken from the shop in such a manner that there may not be any doubt that the samples were taken from the shop where it was stored as food. What is important is whether the sample is within the meaning of Section 2 and whether it is taken from the shop so as to leave no doubt about the manner of taking and if that is so, failure to comply with such provisions as are rendered impossible of performance or as do not affect the quality of sample or give rise to a doubt as to whether sample was taken from the shop does not vitiate the taking of sample. It has transpired in evidence that when the Food Inspector called at the shop at No 8, the respondent No 2 was there and after engaging the Food Inspector into conversation, he somehow gave a slip. If thereafter sample was taken in the manner stated, it is a continuation of the same process and the proprietor or seller shall be deemed to have been present.

14. In the result, we find that samples taken were samples under the law and samples were found to be highly adulterated ghee. The order of acquittal is not therefore, proper and this order cannot be supported.

15. It appears from the evidence that the respondent No 2 is the sole proprietor of M/s. Rathu & Company and under the law both the firm and the sole proprietor cannot be convicted. We, therefore, do not convict the firm. So far as P. C. Rathu is concerned he has not only kept a huge stock of adulterated ghee, but the evidence shows that he was actually preparing large quantities of adulterated ghee, obviously for human consumption. He was not only doing this in a large scale, but when the Food Inspector came, he played a trick and slipped away. We, therefore, find no reason to take any lenient view of the offence committed by him. We have it in evidence that he was convicted prior to this also and the sentence should therefore, be deterrent and we therefore, convict the respondent No 2 P. C. Rathu under Sections 7 (i)/16 (1) (a) (ii) of the Prevention of Food Adulteration Act and sentence him in respect of each case to rigorous imprisonment for one year and a fine of Rs. 2,000, in default to rigorous imprisonment for another six months. The sentences of imprisonment are to run concurrently.

16. K. K. MITRA, J.: I agree.

Order accordingly.

1970 CRI. L. J. 1341 (Vol. 76, C. N. 354)

AIR 1970 CALCUTTA 437 (V 57 C 83)

A. K. DAS AND K. K. MITRA, JJ.

Aravinda Mohan Sinha, Appellant v. Prohlad Chandra Samanta, Respondent

Criminal Appeal No 476 of 1969 with Criminal Revn. Cases 635 and 636 of 1969 D/- 28-11-1969

(A) Defence of India Rules (1962), Rule 126-P (2) — Minimum sentence is imprisonment for six months and also fine — This sentence cannot be substituted by a sentence of fine. (Para 7)

(B) Defence of India Rules (1962), Rule 126-P — Accused sentenced under Section 135 of Customs Act — Accused also to be sentenced under Rule 126-P of Defence of India Rules — No provision of the General Clauses Act bars such sentence — (Customs Act (1962), Section 135) — (General Clauses Act (1897), Section 26).

(Paras 3, 7 and 12)

(C) Defence of India Rules (1962), Rule 126-P(2) — Offenders under the Rule can be dealt with under Section 3 or Section 4 of Probation of Offenders Act — (Probation of Offenders Act (1958), Sections 3 and 4).

Offenders under Rule 126-P of the Defence of India Rules can be dealt with under Section 3 or Section 4 of the Probation of Offenders Act, if the court deems it expedient to take such action. Rule 126-P, sub-rule (2) provides a minimum punishment but it does not override the provisions of the Probation of Offenders Act. Fixation of minimum sentence is not in conflict with Probation of Offenders Act where the Magistrate deems it expedient and this probation or admonition is in lieu of sentence.

(Para 11)

(D) Probation of Offenders Act (1958), Sections 11, 3 and 4 — Order under Section 3 or Section 4 of the Act — Appeal lies notwithstanding Section 411, Criminal P. C. — Revisions against those orders are incompetent — (Criminal P. C. (1898), Sections 411, 439).

(Paras 14, 15)

(E) Limitation Act (1963), Article 115 — Sixty days for appeal under Criminal P. C. — Right of appeal under Section 11 of Probation of Offenders Act is not governed by this Article — Appeal must, however, be filed within reasonable time — Revision, which is incompetent filed 70 days after order — Revision entertained as an appeal — (Probation of offenders Act (1958), Section 11).

(Para 17)

(F) Defence of India Rules (1962), Rule 126-P — Gold to be declared under Rule 126-P legal gold not smuggled gold — Declaration of smuggled gold not intended by legislature — Failure to declare smuggled gold not punishable under Rule 126-P.

(Para 21)

(G) Defence of India Rules (1962), Rule 126-P — Declaration of possession of smuggled gold does not protect the smuggler or the gold — They can be dealt with under the Customs Act. (Para 21)

Bala Chandra Roy, for Appellant. (In both Nos.), Bijoy Ghose, J. K. Chatterjee, for Respondent in Appeal No 476 of 1969, Anil Chandra Chatterjee, for Cri. Revn. No. 635 of 1969; M. A. Rezack, for Opposite Party and Bijoy Ghose, for the State.

DAS, J.: Revisional Applications Nos 635 and 636 of 1969 and Appeal No 476 of 1969, are heard together and this judgment will cover all of them.

2. Aravinda M. Sinha, Asstt. Collector of Customs is the applicant in all these matters against orders passed by different Presidency Magistrates under Section 135, Customs Act and Rule 126P of the D. I. Rules. The accused persons were convicted under both Customs Act and D. I. Rules, R. 126P but the sentences were different. In Rule No 635 and appeal No. 476, the learned Magistrate dealt with them under the Probation of Offenders Act on executing a bond and undertaking thereby to keep peace and be of good behaviour for a period of 2 years and appear to receive sentence whenever called upon.

3. In Rule No 436, the learned Magistrate sentenced the accused to fine only under S 135, Customs Act and refrained from passing any sentence under R. 126P of the D. I. Rules.

4. Under the Customs Act, the convictions were based on a finding that they were in possession of smuggled gold and under Rule 126P of the D. I. Rules for failure to give necessary declaration.

5. Mr. Balai Ray, learned Advocate for the Customs has raised the following points.

1. Punishment for an offence under Rule 126P (2) is imprisonment for a term of not less than six months and not more than 2 years and also fine. The sentence of fine and orders dealing under the Probation of Offenders Act are therefore bad in law.

2. Persons convicted under Rule 126P of D. I. Rules, cannot be dealt with under the Probation of Offenders Act.

5A. The arguments advanced raise the following further points:—

3 Whether a revision petition lies in view of the provision u/s 11 of the Probation of Offenders Act for appeal in respect of an order under the Act

Whether the prayer for treating Rules 435 and 436 as appeals is maintainable in view of Article 115 of the Indian Limitation Act

4 Whether on the facts, conviction under Rule 126P (2) is maintainable.

6. Point No 1.

Sub-Rule (2) of Rule 126P, provides for declaration of possession of gold other than ornament and sub-rule (2) of R 126P makes failure of such declaration "punishable with imprisonment for a term of not less than six

months and not more than two years and also with fine".

7. The provision is clear and the minimum sentence provided is imprisonment for six months and also fine. This sentence cannot be substituted by a sentence of fine, nor can the Magistrate refuse to pass any sentence, after passing a sentence in respect of the offence under Customs Act, under any provision of the General Clauses Act. On facts besides, the offence under the Customs Act is for possession of smuggled gold while it is non-declaration of gold that makes it an offence under Rule 126P.

8. The next question is, whether the offenders can be dealt with under the Probation of Offenders Act, in view of the provision for punishment under Rule 126P.

9. Section 3 of the Probation of Offenders Act empowers the Court to release certain offenders after admonition; Section 4 empowers it to release on probation of good conduct. The only limitation for releasing under Sec. 3 is that the offences must be certain specified offences under the I. P. C. or any offence punishable with imprisonment for not more than two years or with fine or with both under I. P. C. or any other law, that no previous conviction is proved against him and the Court thinks it expedient to take action under the Act.

10. Section 4 provides for release on probation if the offence is not punishable with death or imprisonment for life and the Court is of opinion that it is expedient to release him on probation.

11. Rule 126P, sub-rule (2) provides a minimum punishment but it does not override the provisions of the Probation of Offenders Act. This relates to term of the sentence, in respect of which a minimum is fixed, but it does not take away the Magistrate's power to take action under Section 3 or 4 of the Probation of Offenders Act, if he deems it expedient to take such action. Fixation of minimum sentence is not in conflict with Probation of Offenders Act where the Magistrate deems it expedient and this probation or admonition is in lieu of sentence. Infliction of sentence follows a conviction — whatever may be its extent or form but this Act provides for admonition or probation in place of sentence under certain conditions and therefore provision for a minimum sentence does not affect Court's power under Sections 3 and 4 of the Probation of Offenders Act.

12. In Rule No. 136, the learned Magistrate did not pass any order under Probation of Offenders Act but refrained from passing any sentence. This is not permissible where a minimum sentence is provided for.

13. Point No. 3.

We are dealing with 2 Rules and one appeal. In respect of the Rules, there are prayers for treating them as appeals. The opposite parties have raised an objection, on the ground of limitation under Article 115 of the I. L. Act.

14-15. Sub-section (2) of Section 11 of the Probation of Offenders Act provides for appeal and it reads as follows :

Notwithstanding anything contained in the Code, where an order under Section 3 or S. 4 is made by any Court trying the offender (other than a High Court) an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court.

It is clear that this section provides for an appeal from any order passed under Sections 3 and 4, notwithstanding anything contained in the Code of Criminal Procedure. This is important in view of the provisions of Section 411 of Criminal P. C. which bars appeal from certain orders passed by a Presidency Magistrate.

16. Two of the matters before us are revision applications but in view of clear provision for appeal under Section 11 of the Probation of Offenders Act, revision applications under Section 439, Criminal P. C. are misconceived. Mr. Roy, realised this position and had earlier applied for treating these Rules as appeals. Mr. N. C. Banerjee, appearing for the opposite parties relied on Article 115 of the I. L. Act and pleaded limitation.

17. Article 115 provides for a limitation of sixty days for an appeal under Code of Criminal Procedure, 1898 from any other sentence or any order or any order not being an order of acquittal to the High Court. We have already pointed out that the right to appeal against the order passed by a Presidency Magistrate is not under the Code of Criminal Procedure but under Section 11 of the Probation of Offenders Act and Article 115, I. L. Act, has therefore no application. No limitation is provided for under the amended Limitation Act where right to appeal flows from some Act other than the Criminal P. C. and the period therefore must be taken to be a period which appears to be reasonable to the Court, in the facts and circumstances of the case. For this view, we may point out, by way of analogy, the new provision for limitation for revisional applications under the Criminal P. C., under Article 131. This is a new provision fixing 90 days as the period of limitation from the date of the order or sentence. Before this amended Act came into operation, the period was always considered to be such as appeared to be reasonable in the facts and circumstances of the case. In the instant cases, the petitioners filed revisional applications obviously on wrong advice or misconception and then applied for treating them as appeals before date of hearing. The petitions were delayed by about a week or 10-days beyond sixty days and obviously, within a reasonable period and the prayers should be allowed and these should be treated as appeals. The objections raised are overruled.

18. We have pointed out that in two cases, the learned Magistrates dealt with

petitioners under the Probation of Offenders Act and in our view, this is not in conflict with the provisions of Rule 126P providing for a minimum sentence of R. I. for 6-months and fine. In Rule No. 436, the learned Magistrate sentenced the accused to fine under the Customs Act but refrained from passing any sentence under Rule 126P. We have also found that the minimum sentence is R. I. for 6-months and also fine and the Magistrate is required to pass this sentence if the accused is found guilty.

19. We may however now consider whether on the facts of these cases, a charge under Rule 126P and conviction thereunder is justified. If this is not justified, the conviction and the sentence must be set aside.

20. The accused are prosecuted under the Customs Act for possession of smuggled gold and under R. 126P for failure to give necessary declaration. Did the legislature expect or intend smuggled gold to be declared and were the relevant provisions under the Gold Control Order meant to cover smuggled gold, in respect of which suitable provisions were made in the Customs Act? Gold is defined in Clause (c) of Rule 126A and it reads as follows:—

"Gold" means gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold;

21. Rule 126P makes possession of undeclared gold punishable. Obviously declaration under Rule 126P would not protect smuggled gold or the smuggler and the legislature also never expected that smuggled gold would be declared. Looking at the object of this Control Order and the time and manner in which it came in the Statute Book, it seems that declaration under Rule 126P is in respect of 'legal' gold, as opposed to smuggled gold. Customs Act deals with smuggled gold of foreign origin or marking, illegally imported into India and penalty including seizure is provided for in the Customs Act. The question of declaration in respect of that does not arise at all. Prosecution of the accused persons under Rule 126P is therefore uncalled for and their convictions under Rule 126P and the punishment inflicted are set aside.

22. In view of this, the question of awarding legal punishment under R. 126P in Rule No. 536 does not arise at all.

23. In the result, the convictions of the respondents under Rule 126P and the sentence inflicted are set aside but the convictions under Customs Act and the sentence inflicted thereunder are upheld. The orders under the Probation of Offenders Act in appeal No. 476 and Rule 635 remain.

24. The appeals are disposed of accordingly.

25. K. K. MITRA, J. : I agree.

Order accordingly.

the evidence of D. W. 7 Padan Kumār, a Clearing Agent, that on 27-11-62 he cleared 26 tins of mirchi powder for appellants by R. R. No. 897933 and on 23-11-62 he cleared 75 tins and he identified the tin shown in Court as one of those tins. In cross-examination he stated that he was definite that this very tin was taken delivery by him. He is not connected with the appellants' firm and his evidence not only proves the purchase but he also identifies the container as one of those in which the consignment was cleared from the railway station.

7. The next witness is D. W. 2, the Durwan of the godown at 37, Cotton Street. He says that P. W. 7 Padan Kumar brought the tins of mirchi and he also identifies the tin shown in Court as one of those tins. He stated that he opened the padlock when the Corporation Inspector came and he proves "that the tins were kept in the same condition as kept by him as brought by Padan Kumar". P. W. 6, partner of Mangaldas Raghavi and Co., admitted sale by them of the mirchi powder to appellants' firm and the correspondence and transport of the tins by railway, though he suggested that the tins were replaced and contents tampered. The learned Magistrate relied on him forgetting that he was interested to deny, for otherwise the liabilities would come on them. He however conceded that the tins produced were of the same size but he could not say what distinguished these tins from those in which they supplied. It is besides the prosecution case that the Food Inspector attached the tins after taking sample and the question of replacement of the tins should not, therefore, arise at all. The evidence of D. Ws 7 and 8 who identified the tins and who were not even cross-examined on this point should have persuaded the learned Magistrate to reject the interested evidence of the partner of the firm denying that the consignments were not in identical tins. Sub-section (3) of Section 19 gives right to the firm to appear at the hearing and give evidence. But no attempt was made to produce standard containers to show the difference with those produced by the appellants. Needless to say that the Bombay firm had a great stake and it is not, therefore, proper to give due importance to their denial and throw out the appellants' defence in limine. The appellants again adduced evidence to show that the tins had railway labels affixed on those tins.

8. The Bombay firm denied the rubber stamp warranty; obviously they would, as the liabilities would otherwise come on them. They however adduced no evidence to show that the nature of warranty they used to give and a mere denial is not sufficient. The alleged warranty is written in Gujarati language. The firm witness D. W. 6, claimed it to be in incorrect Gujarati, but the witness who translated it did not say that. In any case, it is of little importance

whether the writing is grammatically correct or not but the writing disclosed warranty within the meaning of Section 19. In the recent Supreme Court decision in Criminal Appeal No. 141 of 1967, (K. Ranganath v. State of Kerala), reported in Blue Print dated 9-10-1969 = (AIR 1970 SC 520), it was pointed out that the warranty is not a document drafted by a solicitor; it is a document using the language of the tradesman. Any tradesman when he is assured that the quality of the article is upto the mark will readily conclude that he is being assured that the article is not adulterated. If the words in the warranty can be reasonably interpreted to have the same effect as certifying "the nature, substance and quality" of an article of food, the warranty will fall within the proviso. The language or the correctness of the language is therefore of no consequence. The learned Magistrate again was not right in treating D. W. 6 as a defence witness, though cited as a defence witness. According to the provisions of the Food Adulteration Act, he would face the prosecution instead of the appellants, if the appellants' contention is accepted and they were really at cross-roads. The initial onus is on the vendor, and if he proves that he purchases the article of food with a written warranty in the prescribed form, he shall not be deemed to have committed any offence. This onus, in our view, is discharged by proving the purchase and the warranty by the manufacturer, distributor or dealer. If the prosecution disputes the warranty, it is its duty to notify the dealer giving the warranty. The dealer is given the extraordinary right to appear and give evidence. If he chooses not to appear, the vendor must be deemed to have discharged the onus and he has committed no offence. The vendor cannot be a defence witness, for a defence witness cannot either have right of appearance or adduce evidence in support. In a prosecution where warranty is pleaded, the seller does not become a defence witness. We find that the seller was not only cited as defence witness but the defence had to pay a considerable amount as travelling expenses of the witness. After the notice is given to the seller, it is their option to appear, in view of sub-section (3) of Section 19 and it is not the duty of the defence to produce him. The scheme of the Act makes them liable as suppliers and if they chose not to come, they take the responsibility of answering when the provisions of law are applied against him.

9. The learned Magistrate's approach treating the partner as a defence witness or relying upon his denial as such is misconceived. The learned Magistrate disbelieved the evidence that railway labels were attached to the tins, as such labels could be easily manufactured. But unless there is evidence that these were so manufactured or procured, the learned Magistrate should have given due weight to the

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labels attached to the tins in deciding the genuineness of these tins.

10. The learned Magistrate unfortunately did not give any importance to this plea of warranty on the ground of delay. It is, however, in evidence that the chillan was shown to P. W. 1 on the date of taking sample and the warranty is impressed on the challan. P. W. 1, the Food Inspector did not deny that the warranty in the rubber stamp was impressed on the challan shown to him and the only object of showing a challan was to raise the plea of warranty. The appellants have also adduced the evidence from D. W. 5 to show that the tins were kept in the same condition as brought by P. W. 7 Padam Kumar, the Clearing Agent. The consignment, therefore, undoubtedly came from the Bombay firm and on the evidence, a large number of tins were brought from time to time. It is unthinkable and not perhaps in usual business course to alter contents of so many tins for purpose of adulteration and if, therefore the adulteration was there, in all probability the adulteration was at source. We have already referred to the challan which disclosed the warranty and the tins were kept in the same condition as received. The appellants, therefore, must be deemed under sub-section (2) of Section 19 not to have committed any offence.

11. Mr. Dutt, the learned Advocate for the appellants, has raised other points viz., about the legality of taking sample and whether the test applied in the case of mirchi powder. It is not necessary in view of our finding to go into this question but we may briefly refer to this. The prosecution case is that the samples were taken in presence of two witnesses, one of them was examined and in cross-examination he stated that he was called to the spot after the samples were taken. The other witness was present even on the date on which P. W. 4 was examined. The learned Magistrate did not examine him on the ground that his appearance was suspicious and he might not tell the truth. It is not for the learned Magistrate to make that impression in the absence of any allegation from the prosecution and such impression on the part of the learned Magistrate shows a bias in favour of the prosecution. After the defence cross-examined P. W. 2, the learned Magistrate put a question which was not for clarification but was in the nature of cross-examination to nullify the effect of cross-examination. The learned Magistrate should not do this at the risk of taking sides. In any case however, leaving aside the evidence of two witnesses, the evidence of the Food Inspector clearly shows that the samples were taken from the shop and then from the godown and looking at his evidence we are not prepared to say that the samples were not taken or that he deposed falsely.

12. Mr. Dutt has also challenged the Food Analyst's report. It appears that when this seizure was made there was no different

standard laid down for mirchi powder which has since been done. There was, however, A. 05 in Appendix B where it was stated, "Spice, the standard, specified for various spices given in the clause shall apply to spices in whatever form whole or partly ground or in powder form". Even before the chilli and chilli powder were separated, this provision fixing standard for chilli would apply to chilli powder. Judged by that standard the present sample is adulterated.

13. We have however found that the appellants purchased the lanka powder from the Bombay firm under warranty and therefore no offence was committed.

14. In the result, the appeal is allowed, the conviction and the sentence passed on the appellants are set aside and they are acquitted. They be discharged from the bail bond.

15. K. K. MITRA, J.: I agree.

Appeal allowed.

1970 ORI. L. J. 1346 (Vol. 76, C. N. 356) =

AIR 1970 DELHI 185 (V 57 C 40)

(HIMACHAL BENCH)

H. R. KHANNA, C. J.

State of Punjab, Appellant v. Dev and another, Respondents.

Second Appeal No. 219 of 1967, D/- 12-5-1970.

(A) Civil P. C. (1908), Section 100 — Finding of fact — Interference with.

The finding whether the accused had committed breach of his bond for good behaviour is one of fact and when supported by evidence it cannot be interfered with.

(Para 6)

(B) Criminal P. C. (1898), Section 401 (3) — Remission of sentence on bond for good behaviour with security — Breach of bond — Government's opinion as to — It is not binding in a civil suit for the bond amount — Independent proof is necessary.

(Para 7)

K. N. Malhotra with S. Malhotra, for Appellant, P. N. Nag, for Respondents.

JUDGMENT:— This second appeal by the State of Punjab is directed against the judgment and decree of learned District Judge, Hoshiarpur, whereby he accepted the appeal of Dev and Duni Chand respondents, and reversed the decision of the trial Court granting a decree for recovery of Rs. 5,000/- in favour of the State of Punjab against Dev and Duni Chand.

2. The brief facts of the case are that Dev was convicted in a case under Section 302, Indian Penal Code, and was sentenced to undergo transportation for life. The order in this respect was made by the Sessions Judge on October 3, 1948. The appeal filed by Dev was dismissed by the High

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Court on December 10, 1949. After Dev had served a sentence of about six years, the Governor of the Punjab in exercise of the powers conferred by Section 401 of the Code of Criminal Procedure remitted the unexpired portion of his sentence and directed Dev to be released on his furnishing security in the sum of Rs. 5,000/- with one surety in the like amount for keeping good behaviour for the period equivalent to the unexpired portion of his sentence. It was also provided in the bond that Dev would surrender whenever called upon to do so during the above-mentioned period. Dev executed the requisite bond in the sum of Rs. 5,000/- on May 25, 1954. His brother Duni Chand stood surety for him. The bonds executed by the two brothers were accepted by Additional District Magistrate, Kangra, on May 31, 1954. Dev was therefore released from Central Jail, Ferozepur, on June 2, 1954. The Governor of the Punjab subsequently cancelled the remission of the unexpired portion of the sentence of Dev appellant on the ground that Dev had started his nefarious activities in violation of the terms of the bond. Report to that effect was made by the Superintendent of Police and the District Magistrate. Dev was thereafter re-arrested on July 11, 1957, and was put in jail to undergo the unexpired portion of his sentence. The Additional District Magistrate, Kangra, thereafter called upon Dev and Duni Chand to pay the amount of bonds. During the course of those proceedings the Additional District Magistrate came to the conclusion that the bonds were not covered by Section 514 of the Code of Criminal Procedure and that the only remedy for the State was to file a suit in a Civil Court. The State of Punjab thereupon filed the present suit for recovery of Rs. 5,000 against Dev and Duni Chand respondents.

3. The suit was resisted by the two defendants. They pleaded that the bonds were inadmissible in evidence; that the suit was barred by time and that the bonds were legally not enforceable. Pleas were further taken that Dev had remained of good behaviour and had not indulged in any nefarious activity. According to the defendant the persons, whose son had been murdered, had made false application to the police against Dev. According further to the defendant the forfeiture of the bonds was not justified.

4. Following issues were framed in the case:—

1. Whether the suit is barred by time?
2. Whether the document requires stamp?
3. Whether the document is not enforceable according to law?

4. Whether defendant No. 1 has not complied with the conditions of the bond?

5. In case issue No. 4 is proved, whether defendant No. 2 is not liable as surety to pay the amount in suit?

6. Relief?

5. The trial Court decided issues 1, 2

and 3 against the defendants. It was further held that Dev defendant has not complied with the conditions of the bond inasmuch as he had not kept good behaviour after his release. Decree for recovery of Rs. 5,000/- was awarded against the defendants. On appeal the learned District Judge considered the terms of the bonds and came to the conclusion that the undertaking under the bonds was that Dev would maintain good behaviour and that in case a demand to that effect was made he would present himself before the appropriate authority. It was only in case he made a default in this respect that he and his surety were to be liable to pay Rs. 5,000/-. The learned District Judge then went into the question as to whether Dev had committed breach of the terms of the bonds and came to the conclusion that there was no disinterested evidence to show that Dev had so conducted himself as to merit the penalty provided for in the bonds. The appeal was, accordingly, accepted and the suit of the Punjab State was dismissed.

6. I have heard Mr. Malhotra on behalf of the appellant and Mr. Nag on behalf of the respondents and am of the view that there is no merit in the appeal. Perusal of the judgment of the learned District Judge shows that he considered the evidence which had been adduced on the record and came to the conclusion that there was no disinterested evidence to prove that Dev had misconducted himself so as to justify the imposition of penalty. Issue No. 4, was consequently decided against the plaintiff-appellant. The finding of the learned District Judge in this respect was essentially one of fact and as it was based upon consideration of the evidence adduced in the case it cannot be interfered with in second appeal.

7. Mr. Malhotra on behalf of the appellant has referred to the provisions of Section 401 of the Code of Criminal Procedure which deals with the power of the appropriate Government to suspend or remit the sentence. Sub-section (3) of that Section, upon which reliance has been placed on behalf of the appellant, reads as under:—

“(3) If any condition on which a sentence has been suspended or remitted, is, in the opinion of the appropriate Government not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted, may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence.”

Perusal of the above sub-section goes to show that if the appropriate Government is of the opinion that any condition on which a sentence has been suspended or remitted is not fulfilled, the said Government may cancel the suspension or remission and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer and remanded to undergo the unexpired por-

tion of the sentence. It would follow from the above provision that the only effect of the formation of the opinion by the Government referred to in sub-section (3) is that the person concerned can be arrested and remanded to undergo the unexpired portion of the sentence. It cannot be inferred from the above provision, as is contended on behalf of the appellant, that once the appropriate Government forms the opinion that there has been a breach of the condition on which a sentence was suspended or remitted its opinion is binding upon the Civil Court in a suit brought for the recovery of money on the ground of the alleged breach of the terms of the bond. The plaintiff appellant in the present case seeks to fasten a pecuniary liability on the defendant-respondents and it would, in my opinion, have to be proved independently in these proceedings that there has been a breach of the terms of the bonds which were executed by the defendants. The opinion of the State Government can be no substitute for a finding of the Civil Court regarding the alleged breach of terms of the bond in a suit for recovery of money on the basis of the said bond. As the learned District Judge has arrived at the finding that the plaintiff has failed to prove any such breach of the terms of the bonds, there is no escape from the conclusion that the plaintiff should be non-suited.

5. In the above view of the matter, it is not necessary to go into the question as to whether a pecuniary liability in the shape of payment of the amount of bonds can be fastened upon the respondents, even though Dev surrendered himself to custody. The appeal consequently fails and is dismissed but with no order as to costs.

Appeal dismissed.

1970 CRI. L. J. 1318 (Vol. 76, C. N. 357) =

AIR-1970 GUJARAT 178 (V 57 C 29)*

J. B. MEHTA AND A. D. DESAI, JJ.

Ghanchi Vora Samsuddin Isabhai, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No 895 of 1968, D/-11-2-1969, against judgment of S. J. Surendranagar, in Sessions Case No 28 of 1968

(A) Evidence Act (1872), S. 35 — Entry of birth-date in non-Government School's General Register under Statutory Rules — Entry admissible under Section 35 — However, its evidentiary value depends on other factors — Kidnapping case — Parents of girl not examined as to her age — Entry held could not be held to have proved the age. (Penal Code (1860), S. 366); (Bombay

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Primary Education Rules, 1949, Rr. 129 and 130). AIR 1961 Pat 21, Distinguished.

(Para 3)

(B) Criminal P. C. (1898), Ss. 236, 237 and 342 — Accused charged under S. 361, Penal Code for kidnapping — On facts disclosed he could also have been charged under S. 366, Penal Code for abduction — Explanation under S. 312, Criminal P. C. also sought in connection with facts constituting offence under S. 366, I.P.C. — Age of victim not being proved, accused could be convicted for abduction under S. 366. (Penal Code (1860), Ss. 361 and 366). AIR 1955 SC 574 at p. 576 (1957) 58 Cr LJ 674 at p. 676 (Orissa) Dist.; AIR 1942 Bom 71 (FB) & AIR 1955 SC 116 & AIR 1965 SC 706, Foll.

(Para 3)

Cases Referred: Chronological Para

(1965) AIR 1965 SC 706 (V 52) =

1965 (1) Cr LJ 630, Sunil Kumar Paul v. State of W. B.

(1961) AIR 1961 Pat 21 (V 46), Bhim Mandal v. Magaram Gorain

(1957) 58 Cr LJ 674 = ILR (1957) Cut 53, Bhagaban Mahakud v. State

(1956) AIR 1956 SC 116 (V 43) = 1956 Cr LJ 291, Willie (William) Slaney v. State of M. P.

(1955) AIR 1955 SC 574 (V 42) = 1955 Cr LJ 1296, Smt. Ram Devi v. State of U. P.

(1942) AIR 1942 Bom 71 (V 29) = 11 Bom LR 27 (FB), Emperor v Kasamalli Mirzali

N. N. Gandhi, for Appellant and J. U. Mehta, A G P., for Respondent-State.

MEHTA, J.:— 1-2. x x x x

3. Mr. Gandhi for the accused raised the most important question in this appeal as to the age of Sheela and argued that this important ingredient in the offence of kidnapping under Section 361 that Sheela was under 18 years age was not brought home to the accused. The learned Sessions Judge has in this connection relied upon the statement of Sheela at Ex. 9 in her evidence that her father when he visited at Wadhwan before this incident told her that this was her birth date. This reported statement of the father would be no evidence, when the father has not been examined. The learned Sessions Judge further relied upon the birth date certificate issued by the Head Master of the Vikas Vidyalaya, Wadhwan, at Ex. 6, which certifies that the birth-date of Sheela as entered in the General Register of the School was 8th August 1951. The witness Jayantilal Nagardas, the Teacher in the Vidyalaya (Ex. 12) was examined and according to him the certificate was as per general register. Entry Ex. 13 This entry in its turn was made from the School Leaving Certificate Ex. 18 issued by Shishu

Mangal, Junagadh by the Head Master of the Primary School. Sheela had proved the said School Leaving Certificate Ex. 18 which also mentions the said birth date. On this evidence, the learned Sessions Judge held that there was satisfactory proof as regards the age of Sheela as the birth date was proved to be 8th August, 1951. Mr. Gandhi vehemently argued that this School Leaving Certificate was not from any official register and even under Section 35 of the Evidence Act it would not be relevant evidence. As regards the birth date of Bai Sheela it is true that this being not a Government school, the document can go under Section 35 of the Evidence Act. It is shown that the headmaster who had issued this certificate was in the discharge of his duties specially enjoined by law to make these entries in the school register. The learned Assistant Government Pleader, Mr. Mehta, in this connection pointed out the relevant rules from the Bombay Primary Education Rules, 1949. Under Rule 129 the school leaving certificate has to be issued. Under Rule 130, the provision is made for the age certificate to the effect that every child seeking admission for the first time into an approved school shall produce a certificate of age signed by its parent. In the case of illiterate parents, the certificates shall bear their thumb impression, attested by a literate person other than a teacher of the school to which the child seeks admission. The date of birth given in this certificate shall be entered in the School General Register. No subsequent change or alteration therein shall be made except with the sanction of the School Board Chairman. In the case of transfer of pupils from one place to another, the age given in the leaving certificate shall be entered in the register of the new school. From these two rules, and the other relevant rules, laying down duties of the teachers and headmasters to maintain the relevant registers and making proper entries therein, Mr. Mehta argued that by a statutory provision the school authorities were enjoined to maintain the General Register and to issue the school leaving certificate. Mr. Mehta is right in this connection that such duty being imposed by law, the entry of the birth date in the School Leaving Certificate from the General Register would be relevant evidence even under Section 35 of the Evidence Act. The difficulty, however, which still arises, is as to the evidentiary value that can be given to the statement of age in this entry made in the School Register. Mr. Mehta pointed out that because of Rule 130, a presumption would arise under Section 114 of the Evidence Act that the parent had given this age. In the present case even though both the parents are alive and are staying

at Ahmedabad and at Surat, none of them was examined to prove the truth of this entry. The prosecution relied on this entry for proving the truth of the statement of the age of Bai Sheela. No connective evidence was led to show that this entry was made on the statement of the parent. No birth register entry or vaccination certificate was even produced. Besides, when both the parents were living and were not shown to be incapable of giving evidence their reported statement would hardly have any higher evidentiary value than hearsay evidence. Mr. Mehta in this connection vehemently relied upon the decision in *Bhim Mandal v. Magaram*, AIR 1961 Pat 21, by Raj Kishore Prasad J. That decision cannot help Mr. Mehta for the simple reason that in that case the statement of the parent, proved by the relevant entry in the school register maintained under the Bihar and Orissa Education Code, could prove the truth of the contents, because the case was covered under Section 32(5) of the Evidence Act as the concerned parent was proved to be incapable of giving evidence and, therefore, the recognised exception to the hearsay rule came into play. Therefore, on the evidence on record in this case, the prosecution has failed to prove that Bai Sheela was under the age of 18 on the date of the offence and the charge under Section 366 for kidnapping therefore cannot be brought home to the accused. The conviction on that count of kidnapping must, therefore, be set aside.

4. Mr. Mehta, however, next argued that as the offence of abduction would be by way of alternative charge to one of kidnapping, the case would clearly fall under Section 236 of the Criminal Procedure Code and in such a case, it is open to the Court under Section 237 of the Criminal Procedure Code to convict the accused for the offence of abduction under the same Section 366 of the Indian Penal Code, if the facts proved established that charge, as the accused met that charge right from the beginning and his explanation was even sought under Section 342. In *Smt. Ram Devi v. State of U. P.*, AIR 1955 SC 574 at p 576, the Supreme Court had to consider this question as to whether the accused could be convicted for abduction under Section 366, when the prosecution failed to prove the ingredient of age for the offence of kidnapping under Section 361. Their Lordships of the Supreme Court held at page 576 that apart from the fact that that was not the charge under Section 366, the evidence on record did not warrant the conclusion that the concerned lady was either compelled by force or induced by any deceitful means to go from her father's place by the accused, nor was any question put to the accused in the examination under

Section 342, Cr. P. C. in that connection. In these circumstances, the Supreme Court did not accept that argument. The fact of absence of a specific charge of abduction would not be material in this case as the accused at the initial stage on the facts disclosed in the charge-sheet could have been alternatively charged both for kidnapping and abduction under Section 366. After the decision in *Empress v. Karamalli Mirzali*, 41 Bom LR 277 (AIR 1942 Bom 71) (FB) by the Full Bench consisting of Sir John Beaumont, Kt, Chief Justice, Wadia J. and Sen J., it is well settled that if the prosecution had been doubtful whether they could prove that the evil was under the relevant act they could put up alternative charge of kidnapping and abduction for Section 236 of the Criminal Procedure Code would be clearly applicable. In view of this specific provision of Section 237, the want of a specific charge could not by itself be treated as any prejudice to the accused. The position of law in this connection is also well settled after the decision of the Supreme Court in *Willie (William) Slaney v. The State of Madhya Pradesh*, AIR 1956 SC 116. In the majority judgment, by His Lordship Chandrasekhar Aiyar J., on behalf of himself and Jagannath Das, J. and with which Inam, J. agreed, at page 137, it is in terms held that there may be cases where a trial, which proceeds without any kind of charge at the outset, can be said to be a trial wholly contrary to what is prescribed by the Code and in such cases, the trial would be illegal without the necessity of a positive finding of prejudice. By way of illustration, it is in terms pointed out that where the conviction is for a totally different offence from the one charged and not covered by Sections 236 and 237 of the Code, the omission to frame a separate and specific charge would be an incurable irregularity amounting to an illegality. When the charge is of a minor offence, there would be no conviction for a major offence, e.g., grievous hurt or rioting and murder. Therefore, where a charge is not for such a distinct offence, which would not be covered by Sections 236 and 237 of the Criminal Procedure Code, the conviction for the other charge which could have been made in the alternative would always be legal, provided no prejudice has resulted to the accused. On that principle, in *Sunil Kumar Paul v. State of West Bengal*, AIR 1965 SC 706, the Supreme Court held that the accused could be convicted for the offence under Section 420, I.P.C., even though he was charged only for the offence under Section 409 because that alternative charge could have been framed under Section 236 of the Criminal Procedure Code on the basis of the allegation in the charge-sheet. Such con-

viction would be in accordance with the provision of Section 237 of the Criminal Procedure Code. The Supreme Court further held at p. 712 that in the circumstances of the case the accused could not be said to have been prejudiced in his conviction under Section 420, I.P.C. on account of non-framing of the charge and consequent non-trial, under Section 420, I.P.C. Their Lordships further observed that in the circumstances of the case no question of irregularity in the trial arose. The framing of the charge under Section 420, I.P.C. was not essential and Section 237, Criminal Procedure Code itself justified his conviction of the offence under Section 420 if that is proved on the findings on the record. Mr. Gandhi, in this connection, relied upon the decision in *Bhagaban Mahakul v. State*, in (1957) 50 Cri LJ 674 (Orissa) at p. 676 holding that where the charge of kidnapping is not proved, the conviction could not be had for the offence of abduction under Section 366. That decision cannot help Mr. Gandhi as in that case the accused was held to be prejudiced, if he was convicted for abduction, because the original charge of kidnapping was one read with Section 149. As the prejudice had been duly established, the conviction could not be on the basis of abduction which was found on the record. In view of this settled legal position, as the accused had met the charge right from the beginning of abducting Sheela by deceitful means, with the same intention with which he was charged for kidnapping, and as the explanation under Section 342 was also taken in that connection, no question of prejudice could arise. Under Section 237 Criminal P. C. the accused could, therefore, be convicted for the offence under the said Section 366, I. P. C., even if instead of kidnapping, the offence of abduction with the same intention is proved.

5-9. x x x x x

Appeal dismissed

1970 CRI. L. J. 1350 (Vol. 76, C N. 358) =
AIR 2970 GUJARAT 185 (V 57 C 31)*

N. G. SHELAT, J.

Adam Ahmed, Appellant v. State, Respondent

Criminal Appeal No. 178 of 1966, D/-2-2-1968, against order of City Magistrate 10th Court, Ahmedabad, D/-15-2-1966

Criminal P. C. (1898), S. 539-B — Local inspection — Failure to make memorandum and keep it on record of case — Trial or proceeding is not vitiated unless it has resulted in failure of justice or caused prejudice to accused in his defence. (Para 5)

(*Only portions approved for reporting by High Court are reported here)

CN/DN/G189/69/JHS/C

N N. Dave, for Appellant; H. V. Bakshi, Asstt Govt Pleader, for Respondent.

JUDGMENT:—

1-4. x x x x x

5. Mr. Dave, the learned advocate for the appellant, has pointed out that at the request of the accused during the course of the trial, the learned Magistrate had inspected the place of incident and that he has kept no notes whatever about the same on the record of the case. According to him, therefore, he has violated the mandatory provisions contained in Section 539-B of the Criminal P. C. On that basis, he further urged that the defence of the accused is materially prejudiced and the appreciation of the evidence could not be made in a proper manner by the learned Magistrate. It appears no doubt true that an application was presented by the accused on 20-1-1966 to the Court requesting the Court to take local inspection of the place of the incident and other places referred to in the evidence. From the order passed therebelow, it appears that the learned Magistrate granted that request and fixed 22-1-1966 for going for local inspection. From the proceedings it appears that it was on 29-1-1966 that the local inspection of the site was taken and then he adjourned the case to 2-2-1966. The arguments in the case were heard on 9-2-1966 and the judgment was thereafter delivered on 15-2-1966 in the case. From the record and proceedings of this case it further appears clear that no notes of the local inspection made by the learned Magistrate have been kept on the record of this case. At the same time he has made no reference whatever about the same in his judgment. Now, S 539-B of the Criminal P. C. provides as under—

"539B. (1) Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant, or accused so desires, a copy of the memorandum shall be furnished to him free of cost.

x x x x x"

It follows therefrom that if any local inspection is made by the learned Magistrate in relation to any case before him under Section 539-B of the Criminal P. C., it is required of him to record the memorandum of any relevant facts observed at such inspection without unnecessary delay and any such memorandum made by him would form part of the record of the case.

The learned Magistrate has, however, not chosen to keep any record of what he observed in the local inspection made by him under Section 539-B of the Code. This section, however, does not lay down the effect that would flow therefrom when no such memorandum has been kept on the record of the case. Non-compliance thereof cannot have therefore, the effect of vitiating any trial or the proceeding unless it is shown that it has resulted in any failure of justice in the circumstances of the case. Unless therefore, any prejudice is caused to the accused in his defence, or has resulted in failure of justice on that account, the decision in the case, otherwise arrived on appreciation of evidence cannot be set aside. It is not an illegality so committed as to vitiate the trial.

6. Now it was after the local inspection was made by the learned Magistrate that the matter was set down for arguments and the arguments were heard. The learned advocate appearing for the accused in that Court made no request whatever to have the notes of inspection placed on record. Nor is there any material to show that the learned Magistrate has made use of any observation to the disadvantage in appreciating the evidence in the case. It is not suggested and at any rate it does not appear that no cross-examination was done of the witnesses, as the local inspection was to be made. On the other hand, the grievance of Mr Dave is that the learned Magistrate has not at all chosen to appreciate the evidence and has given no reasons in coming to the conclusion that he arrived at in the case. According to him, except narrating the facts in judgment, no reasons have been given which led him to accept the evidence led by the prosecution and for coming to the conclusion that he did in the case. That criticism levelled by Mr Dave cannot be said to be altogether without any force, but that does not in any way affect the decision in the case. At any rate, I am not show how the appreciation of evidence by the learned Magistrate has been so affected by reason of his not keeping notes of inspection made by him in the case.

x x x x
Appeal dismissed

1970 CRI. L. J. 1351 (Vol. 76, C. N. 359) =
AIR 1970 GUJARAT 186 (V 57 C 32)

J. M. SHETH, J.

Patel Bechar Narsinh, Petitioner v. The State of Gujarat and another, Opponents

Criminal Revn. Appln No. 145 of 1969, D/- 19-8-1969, against judgment and order of Judicial Magistrate 1st Class, Mangrol, in Criminal Case No 2678 of 1968.

FN/GN/C797/70/RGD/P.

(A) Bombay Probation of Offenders Act (19 of 1938), S. 5(1) — "Offence not punishable with death or transportation for life" — Expression means offence not punishable with death or offence not punishable with transportation for life — Under S. 53-A, Penal Code transportation for life means imprisonment for life — Accused convicted under S. 326 Penal Code cannot be given benefit of S. 5(1). AIR 1928 Bom 211, Foll. Case law Referred. (Paras 7, 8, 11)

(B) Criminal P. C. (1898), S. 439(6) — Right of accused "to show cause against enhancement of sentence" — Notice why order releasing him on probation of good conduct should not be set aside, order being illegal and invalid and pass sentence in lieu of it — This is not a case of enhancement of sentence passed by Court recording Order of conviction and releasing accused on probation of good conduct — Accused has no right to be heard in regard to order of conviction against him, since there was no sentence awarded either under S. 439(6) or under S. 7(1), Bombay Probation of Offenders Act. AIR 1913 Mad 521 & AIR 1939 Sind 339 & AIR 1950 Raj 28, Rel. on; (1919) 2 Sau LR 48 observations in dissented from. (Para 18)

(C) Bombay Probation of Offenders Act (19 of 1938), S. 7(2) — Accused convicted and released on probation of good conduct — Appellate Court in exercise of powers of revision can set aside order of probation and pass sentence in lieu thereof not greater than that which trial Court could have awarded — It is not necessary to remand case to trial Court for passing sentence — High Court is not restricted to passing non-appealable sentence. (Paras 27, 28)

(D) Penal Code (1860), S. 326 — Offence under — In considering sentence to be passed, nature of injury, weapon used and part of body on which injury was caused are important factors to be considered — (Sentence of one year's R. I. and fine of Rs. 125 passed — Sentence of fine of Rs. 125 was passed in view of the order of the trial Magistrate for paying the amount as compensation to the victim keeping in view the provisions of Section 6 of the Bombay Probation of Offenders Act (1938)). (Paras 29, 36)

Cases Referred: Chronological Paras
(1965) AIR 1965 Orissa 106 (V 52) =
1965 (2) Cri LJ 51, Jogi Nahak
v The State 13
(1964) 1964 (1) Cri LJ 460 = ILR
(1963) Mys 929, State of Mysore
v Saib Gunda 12
(1959) AIR 1959 Madh Pra 291 (V 46)
= 1959 Cri LJ 989, Chetti v. State
of Madhya Pradesh 11
(1956) AIR 1956 All 326 (V 43) =
1956 Cri LJ 659, State v. Sheo
Shankar 10

(1950) AIR 1950 Raj 26 (V 37) =
51 Cri LJ 1332, Sarkar v. Jalam-
singh 22

(1949) 2 Sau LR 48, United State of
Saurashtra v. Koli Ganga Kana 23

(1943) AIR 1943 Mad 521 (V 30) =
44 Cri LJ 774, In re: Varadaraja
Padayachi 20

(1939) AIR 1939 Sind 339 (V 26) =
41 Cri LJ 187, Emperor v. Miro
Ghulam Hussain 21

(1932) AIR 1932 Nag 130 (V 19) =
33 Cri LJ 844, Emperor v. Mt.
Janki 22

(1928) AIR 1928 Bom 244 (V 15) =
29 Cri LJ 901, Naranji Premji v.
Emperor 23

(1927) AIR 1927 Rang 205 (V 14) =
28 Cri LJ 773 (FB), Emperor v.
Nga San Hwa 24

(1926) AIR 1926 Rang 51 (V 13) =
27 Cri LJ 401, Mohammad Euroof
v. Emperor 25

G. C. Patel, for Petitioner, J. U. Melita,
Hon Asst Govt Pleader, for Respondent
No. 1—State, B. R. Shelat (Appointed),
for Respondent No. 2.

ORDER:— This is a revision petition filed by the original complainant (first informant) against the order passed by the learned Judicial Magistrate, First Class, Mangrol, Mr. R. C. Shah, in Criminal Case No 266 of 1968, releasing present opponent No 2, Maiya Dolu Kar-san, who was original accused No 2, on probation of good conduct Opponent No. 2 has been convicted of an offence punishable under Section 326 of the Indian Penal Code. He was ordered to be released on probation under Section 5(1) of the Bombay Probation of Offenders Act, 1938 (which will be hereinafter referred to as the Act), on furnishing a bond of Rs 1,000/- for a period of one year with a solvent surety for the like amount to keep and maintain peace during the aforesaid period and to receive the sentence when called upon during the aforesaid period. This order was passed on 30th December, 1968.

2. Mr. G. C. Patel, learned Advocate appearing for the petitioner, submitted that the offence under Section 326 of the Indian Penal Code is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years, and is also liable to fine. Maximum punishment provided for such an offence being imprisonment for life, it was submitted by Mr. Patel that the trial Court has committed an error in giving benefit of Section 5(1) of the Act to opponent No 2. He, therefore, submitted that the order passed by the learned trying Magistrate, releasing Opponent No. 2 on probation of good conduct, be set aside and in lieu of it, proper and adequate sentence be passed

3. Mr J. U. Mehta, the learned Hon. Assistant Government Pleader, who appeared for Opponent No. 1 (State of Gujarat), supported the submissions made by Mr. Patel.

4. Mr. B. R. Shelat, learned Advocate (appointed) for Opponent No. 2 (accused No. 2), submitted that Opponent No. 2 had a right to challenge the order of conviction recorded against him on facts in view of the provisions of Section 439, sub-section (6) of the Criminal Procedure Code (which will be hereinafter referred to as the Code). It is further contended by him that this Court cannot award sentence and the case should be remanded to the trying Magistrate for awarding proper and adequate punishment. It was further submitted by him that at any rate, the Court should not award punishment which is more than non-appealable sentence. It was also submitted by him that the provisions of Section 5(1) of the Act have application as the offence under Section 326 of the Indian Penal Code is not punishable with death or imprisonment for life; it being punishable with imprisonment for life, the provisions of Section 5(1) of the Act could be made applicable.

5. I will first consider the submission made by Mr. Shelat whether the provisions of Section 5(1) of the Act could be made applicable in a case where the offence regarding which the order of conviction is recorded is punishable with imprisonment for life or imprisonment for any other term. The material part of Section 5(1) of the Act for our purposes reads—

"Notwithstanding anything contained in any enactment for the time being in force when—

(a) any male person is convicted of an offence not punishable with death or transportation for life, or if it appears to the Court by which the offender is convicted, that regard being had to the age, character, antecedents or physical or mental condition of the offender, or to the circumstances in which the offence was committed, it is expedient that the offender should be released on probation of good conduct, the Court may, for reasons to be recorded in writing instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not being less than one year and not exceeding three years as the Court may direct, and in the meantime to keep the peace and be of good behaviour"

6. The interesting question that arises for consideration is what is the meaning to be assigned to the words, "of an offence not punishable with death or transportation for life"

7. The material part of Section 53-A of the Indian Penal Code for our purposes, reads—

"(1) Subject to the provisions of sub-section (2) and sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to 'imprisonment for life'."

In view of these provisions of Sec 53-A we have to read "imprisonment for life" for the words "transportation for life" in Section 5(1) (a) of the Act

8. In Section 497, sub-section (1) of the Code, similar wording in regard to this material phrase is found. It reads:

"When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life."

These words came to be interpreted by a Division Bench of the Bombay High Court in *Naranji Premji v. Emperor*, AIR 1928 Bom 244. Fawcett, J., speaking for the Division Bench, made the following observations—

"The first point taken by Mr. Jinnah in this application for bail is that in sub-section (1) of Section 497, Criminal Procedure Code, the words

"if there appear reasonable grounds, for believing that he has been guilty of an offence punishable with death or transportation for life"

only cover offences punishable with death or in the alternative with transportation for life, such as cases of murder and of waging war under Sections 302 and 121, I.P.C., and that they do not include offences merely punishable with transportation for life. Although no authority has been referred to in the argument before us, there is, in fact, a ruling that does support Mr. Jinnah's contention, viz *Mohammad Eusoo v. Emperor*, AIR 1926 Rang 51. But that has been overruled by a Full Bench of the same Court in *Emperor v. Nga San Htwa*, AIR 1927 Rang 205 (FB). In my opinion, this is a construction which cannot be adopted. If one refers to the definition of "warrant case" in Section 4(1) (w), Criminal P. C., it will be seen that it is defined as a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months. The legislature obviously does not there mean an offence which is punishable with those

kinds of different punishments in the alternative, and they do not put the word "with" before "transportation" or before "imprisonment". Therefore, I do not attach any importance to the argument that in sub-section (1), Section 497 the word "with" does not appear before "transportation for life," and, therefore, the reference is merely to an offence which is punishable with death or in the alternative with transportation for life."

9. In *Emperor v. Mt Janki*, AIR 1932 Nag 130, Grille, Acting Judicial Commissioner, observes:

"The phrase 'punishable with death or transportation for life' must be interpreted disjunctively and women convicted of an offence for which transportation for life is one of the punishments provided are eligible for release on probation under Section 562. The words 'death or transportation for life', must be read as referring to offences the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments awarded and not necessarily both."

The learned Acting Judicial Commissioner has referred to several provisions of the Code like, Sections 4(1) (w), 31 and 34 in support of his reasoning. I am in respectful agreement with it.

10. A Division Bench of Allahabad High Court in *State v Sheo Shanker*, AIR 1956 All 326, has also taken the same view. The relevant observations made therein are:

"The words 'punishable with death or transportation for life', cannot mean 'punishable with death or in the alternative with transportation for life'. The plain meaning of the words 'an offence not punishable with death or transportation for life' is 'an offence not punishable with death or an offence not punishable with transportation for life'."

Death or transportation for life must not be a punishment that can be legally inflicted for the offence, if death can be inflicted or if transportation for life can be inflicted, it is not "an offence not punishable with death or transportation for life" regardless of whether any other punishment can be inflicted either in the alternative or in addition to the punishment of death or transportation for life, as the case may be. Since the offence of Section 409, Penal Code is punishable with transportation for life or imprisonment and fine, the accused could not be released on probation of good conduct."

11. Same view has been taken by a Division Bench of Madhya Pradesh High Court in *Chetti v State of Madhya Pradesh*, AIR 1959 Madh Pra 291, observing: "Section 562 of the Criminal Procedure Code and Section 4(b) of the CP and Berar Probation of Offenders Act are an exception to the general scheme of

punishments awardable under the Indian Penal Code and the Criminal Procedure Code. The phrase "not punishable with death or imprisonment for life" ought to be interpreted in its ordinary disjunctive sense. Its scope cannot be permitted to be expanded by giving a strained meaning, by reading it conjunctively. AIR 1932 Nagpur 130 was affirmed. AIR 1927 Rangoon 205 (FB) was relied on. AIR 1927 Nagpur 53 was not approved."

12. *H Hombe Gowda*, Officiating J of Mysore High Court, in *State of Mysore v. Sab Gunda*, 1964 (1) Cr LJ 460 (Mys), has taken a similar view, observing:

"The provisions of Section 4 are not applicable to a case where a person is found guilty under Section 326, Penal Code, inasmuch as the maximum sentence prescribed for the offence is imprisonment for life."

13. A Single Judge of Orissa High Court in *Jogi Nahak v The State*, AIR 1965 Orissa 106, has taken a similar view, observing:

"The provision for punishment in Section 394, Penal Code for imprisonment for life or imprisonment for ten years and fine cannot be read conjunctively so as to mean that it provides an alternative sentence for the offence concerned. Hence, where the accused is convicted under Section 394, Penal Code, the accused cannot be given the benefit of the provisions of Section 4 or 6 of the Probation of Offenders Act and released on probation of good conduct, on the ground that the offence did not provide for punishment for imprisonment for life."

14. Taking into consideration the wording of Section 5(1) of the Act and the aforesaid decisions, it is evident that the learned Magistrate has committed an error in giving opponent No 2 the benefit of releasing him on probation of good conduct. The reasoning adopted in these decisions, in my opinion, is quite correct. Furthermore, I am bound by the decision of the Bombay High Court, the decision being given before the date of bifurcation.

15. I will now consider the submission made by Mr Shelat for opponent No 2, that in view of the provisions of Section 439(6) of the Code, he has a right to challenge the order of conviction on facts and he has a right to show cause against his conviction. Section 439 of the Code deals with High Court's powers of revision. Sub-section (2) of it states:

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

Sub-section (1) of it reads:

"In the case of any proceeding the record of which has been called for by

itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence

Sub-section (6) of it reads:

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause be entitled also to show cause against his conviction"

We have to read these sub-sections (2) and (6) of Section 439 of the Code in conjunction. Sub-section (2) of it contemplates issue of a notice to the accused before any order to his prejudice is being passed. It contemplates that he should be given an opportunity of being heard either personally or by a pleader in his own defence before any order is passed to his prejudice. In the instant case, such a notice has been given to opponent No 2 and the notice has been served. An Advocate is also appointed for him and is heard.

16. A short, but interesting question that arises is whether the present case will be covered to sub-section (6) of Section 439 of the Code. The wording of that sub-section (6) clearly indicates that the accused is entitled to show cause against his conviction when an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced. It, therefore, means that the Legislature has given him an opportunity to challenge his conviction when a notice has been given to him to show cause why his sentence should not be enhanced. In the instant case, no notice has been given to opponent No 2 to show cause why his sentence should not be enhanced. The notice has been given to him as to why this order of releasing him on probation of good conduct should not be set aside, the order being illegal and invalid and pass sentence in lieu of it.

17. The interesting question, therefore, that arises is whether it can be said that this is a case of enhancement of any sentence passed by the Court recording the order of conviction and releasing opponent No 2 on probation of good conduct.

18. Section 53 of the Indian Penal Code which falls in Chapter III relating to punishments, enumerates different punishments provided in the Indian Penal Code. It reads:

"Punishments" — The punishment to which offenders are liable under the provisions of this Code are, —

First — Death;

Secondly — Imprisonment for life,

Thirdly — Repealed by Act No. 17 of 1949;

Fourthly — Imprisonment, which is of two descriptions, namely—

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly — Forfeiture of property,

Sixthly — Fine."

That Section 53 of the Indian Penal Code does not indicate that this order of releasing opponent No 2 on probation of good conduct was an order inflicting any punishment.

19. We will now consider the relevant provisions of Sections 5 and 7 of the Act. I have already quoted the material part of Section 5(1) of the Act. The wording of it clearly indicates that when the Court comes to the conclusion that in view of the conditions specified in that sub-section (1) of Section 5 of the Act, the offender should be released on probation of good conduct, the Court has to record reasons in writing and the Court instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period not being less than one year That wording clearly indicates that in such a case, the Court, after recording the order of conviction, postpones the passing of sentence, meaning thereby, postpones inflicting of any punishment and instead of passing any order of sentence, the Court directs that he should be released on his entering into a bond with or without sureties to appear and receive sentence when called upon during such period not being less than one year but not exceeding three years as the Court may direct and in the meantime, to keep peace and be of good behaviour. It is, therefore, evident that when such an order of releasing on probation of good conduct is passed, there is no order of sentence passed. No punishment is visited upon him. On the contrary, that order is postponed. It could not, therefore, be said that any order of sentence was passed or any punishment was visited upon the accused as contemplated by Section 53 of the Indian Penal Code.

20. Section 7 of the Act reads.

"(1) Notwithstanding anything contained in the code except in cases in which the offender has pleaded guilty, or where the order is passed by the High Court, an appeal shall lie from an order of conviction in every case in which an order is passed under Section 4 or 5 to the Court to which appeals ordinarily lie under the Code"

A perusal of the wording of this sub-section (1) of Section 7 of the Act clearly

indicates that by not passing an order of sentence and by postponing the order of punishment, the accused is not in any way prejudiced. Even though no order of sentence is passed and he is released on probation of good conduct, he has been given a right to appeal from an order of conviction and such appeal is to be filed to the Court to which such appeals ordinarily lie under the Code.

21. Sub-section (2) of Section 7 of the Act reads:—

"The Appellate Court or the High Court in the exercise of its powers of revision may pass any such order as it could have passed under the Code, or may set aside an order under Section 4 or 5 and in lieu thereof pass sentence on such offender according to law."

This sub-section (2) makes it quite clear that this Court is entitled to set aside such an order in exercise of its powers of revision, and is further entitled in lieu thereof to pass sentence on such offender according to law. No doubt, that power vested in this Court is circumscribed by a proviso added to it. That proviso reads,

"Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted"

This Court cannot inflict punishment higher than the punishment that could have been inflicted by the Court by which the offender was convicted. This is another safeguard to protect the interest of the offender as the powers of this Court are curtailed and this Court cannot award punishment higher than the punishment that could have been awarded by the Court by which the offender was convicted. This Court, in revision, is entitled to set aside such order and in lieu thereof, it is empowered to pass sentence on such offender according to law. It further indicates that the order that was passed by the trying Magistrate, namely, releasing Opponent No 2 on probation of good conduct was not in order of sentence. An order of sentence was postponed. If such an order was not warranted by law, this Court can set aside that order in the exercise of its revisional powers and this Court, in lieu thereof, can pass sentence on such offenders according to law. What this Court, therefore, does is awarding sentence according to law in lieu of the order passed, namely, the order of releasing the offender on probation of good conduct. It could not, therefore, be said that this Court, while exercising this power vested in it under this sub-section (2) of Section 7 of the Act in the exercise of its revisional powers, is enhancing sentence. As no sentence was awarded by the trying Court, there could not be any ques-

tion of enhancement of sentence. What this Court does is that the Court finds that this order of releasing the offender on probation of good conduct is illegal, it being not warranted by law and in lieu thereof, passes sentence on the offender according to law. No doubt, while passing that sentence, the Court has to keep the aforesaid proviso in mind, as the powers of this Court are curtailed by that proviso. There being no question of enhancement of sentence, provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. It being the position, opponent No 2 has no right to be heard in regard to the order of conviction passed against him.

22. It was contended by Mr. Spelat that this would be against the principles of natural justice. If the accused had been awarded even a nominal sentence and this Court had issued a notice for enhancement of sentence, the accused would have been in a position to challenge this order of conviction in view of the provisions of Section 439, sub-section (6) of the Code. In the instant case, the trying Court did not find necessary even to award a nominal sentence to opponent No 2 and thought that it was a fit case to release the offender on probation of good conduct. When this Court is trying to set aside that order in the exercise of its revisional powers, and is awarding him substantial sentence, he cannot challenge conviction. If the interpretation placed by Mr. Patel and Mr. Mehta is accepted, the result would be that such a person will not have any right to be heard against his order of conviction. The Legislature could have hardly contemplated such a result.

In my opinion, this argument is not well founded. In a case where this Court is exercising its revisional powers under Section 439 of the Code, to enhance the sentence awarded, the offender has been given a statutory right under sub-section (6) of Section 439 of the Code to challenge the order of conviction. In a case like the instant case, when this Court is exercising its revisional powers under Section 439 of the Code, in view of the provisions of sub-section (2) of Section 7 of the Act, this Court has got power to set aside such an order of releasing the offender on probation of good conduct and it has got further power to pass sentence according to law in lieu thereof. If the legislature really intended to give any statutory right to the accused that he should be heard against the order of conviction, the legislature could have very well made such provision in Section 7 of the Act. The legislature has not made any such provision. This Court has not to make the law. It has to interpret the law as it is. If there is any such grievance, appeal should be to the legis-

lature and not to the Court. In my opinion, there being no question of any enhancement of sentence, the provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. This conclusion of mine gets support from several decisions which I will presently refer to.

23. In *re Varadaraja Padayachi*, AIR 1943 Mad 521, Horwill, J., has observed: "Where an illegal order under Section 562 is passed by a Magistrate and on appeal the Sessions Judge affirms the conviction but refers the case to the High Court as to the sentence, the case should not be regarded as one for enhancement of the sentence, entitling the accused to agitate findings of fact."

It is true that detailed reasons are not recorded in that decision to support the aforesaid reasoning.

24. In *Emperor v. Miro Ghulam Hus-sain*, AIR 1939 Sind 339, the pertinent observations made are:

"The learned Advocate who appeared for this Miro, who is a young man of, as the Magistrate says, about 25 years of age, claimed to be heard on the merits of the case, because he said that under Section 439(6), Criminal P. C., he could show, in case of enhancement of a sentence, cause against the sentence itself. But we do not see how it can be said here that we are enhancing a sentence or acting under Section 439(6) because the enhancement of a sentence presumes there is a sentence to be enhanced, but under Section 562, Criminal P. C., it is clear that what is done is done in lieu of sentence."

After quoting the wording of Section 562 of the Code, which is substantially similar to the wording of Section 5(1) of the Act, it is observed.

"So it is clear to us that under Section 562, Criminal P. C., when an accused is released on probation of good conduct no sentence is passed by the Court. Therefore, when, as under Section 562(3) we are entitled to do, we set aside an order and pass a sentence in lieu thereof, it cannot be said that we enhance a sentence within the meaning of Section 439(6), Criminal P. C., and however unfair this may appear to the learned Advocate, we are here to interpret the law and not to make it. Therefore, we are not prepared to hear the learned Advocate upon the merits of the case, though we have heard him on all matters material to the question before us, that is the passing of a sentence of imprisonment in lieu of the order passed by the Magistrate under Section 562, Criminal Procedure Code."

25. A Division Bench of Rajasthan High Court, in *Sarkar v. Jamalsingh*, AIR 1950 Raj 28, has observed

"When an accused is released under

Section 562(1) on probation of good conduct no sentence is passed by the High Court. Therefore, when a case is referred to High Court for passing a sentence under Section 562(3), the case is not one for enhancement of sentence within the meaning of Section 439(6) entitling the accused to show cause against the conviction."

In my opinion the reasoning adopted in these decisions is correct, if we bear in mind the wording of the relevant provisions of Section 439 of the Code and that of Sections 5 and 7 of the Act and the provisions of Section 53 of the Indian Penal Code.

26. Mr. Shelat in support of his argument, relied upon a decision of the Saurashtra High Court in *United State of Saurashtra v. Koli Ganga Kana*, (1949) 2 Sau LR 48. That decision lends support to my conclusion that the benefit of Section 562 of the Code cannot be given to the accused who has been convicted of an offence which is punishable with transportation for life. So far as the second question is concerned, no doubt, that decision lends support to the argument advanced by Mr. Shelat. The observations made at pages 51 and 52 are as under:—

"The other question, i.e., the one under which the accused-opponent would be entitled to show cause against his conviction is a more important one, and the learned Government Pleader has pointed out two cases in support of his contention that the accused has no such right. He refers us to a Sind decision reported at page 339 in AIR 1939, Sind and another reported at page 521 in AIR 1943 Madras. Both the Courts have held that in a case under Section 562 accused has no right to show cause against his conviction. With great deference to their Lordships who decided both these cases, we have to observe that we are unable to agree with the narrow view of the law that they have taken. The ratio decidendi in those cases is that the case in question is not a case of enhancement of the sentence and hence the provisions of Section 439 which enable the accused to show cause against his conviction do not operate in favour of the accused who has not been sentenced at all. Technically speaking, their Lordships may be right, but such a construction of Section 439 offends against the principles of natural justice, and in our opinion, such a construction would be both too technical and too narrow. To illustrate our point of view it amounts to this that a person who has been barely convicted and not sentenced is on a worse footing than a person who has been sentenced, and given an inadequate sentence, or to be more clear as to what we mean, such an interpretation would react very unfavourably against those persons

who are convicted and dealt with under Section 562. The result in such a case will be that a person who has been let off with a binding over order against him, and who naturally would be under a sort of confidence that in case in future he behaves better, there is no apprehension of any sentence whatsoever, would be taken by surprise by an order from the High Court calling upon him to appear before it and receive conviction. To give an arithmetical illustration, if when the unit of sentence already inflicted is 1, 2, 3 etc., and if the same is sought to be enhanced to 4, 5, 6 etc., the person has a right to show cause, while if the unit of the sentence is zero and is yet sought to be substituted by any other arithmetical figure, he has no right to show cause against his conviction. This works as an absurdity. Moreover, on a careful perusal of Section 439 which has ample safeguards for the benefit of those accused against whom no order could be passed, to their prejudice would be naturally deprived of those benefits which do exist in their favour as the section stands."

With due deference to the learned Judges of the Saurashtra High Court, I may say that the reasoning advanced does not appeal to me. When the language of the relevant sections does not admit of any ambiguity and the language clearly indicates that such a right is given to the offender only when a notice has been issued by this Court for enhancement of sentence, it will not be proper for this Court to take any such factors into consideration as has been done by the Saurashtra High Court and interpret the provisions of Section 439 of the Code in that manner when the language does not justify such interpretation. As said in the aforesaid Sind decision, the Court has not to make the law. It has to interpret the law as it is. There being no question of an enhancement of sentence, as no sentence was awarded by the trying Magistrate, the provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. As said by me earlier, if there be any such grievance, as has been suggested in this Saurashtra decision, there should be an appeal to the legislature and not to the Court. I am, therefore, of the view that in such a case, the accused is not entitled to show cause against his conviction.

27. The submission made by Mr. Shelat that this Court cannot award sentence and the case should be remanded to the trial Court for awarding sentence as it was that Court which had recorded the order of conviction, in my opinion, is not well founded. His argument was based on the ground that if the order of sentence is passed by the trying Magistrate, he will get a right to appeal against

that order of sentence and wherein possibly, he will be again entitled to challenge the order of conviction. In my opinion, this argument cannot be accepted as a correct argument. The reason is that Section 7(2) of the Act clearly indicates that the appellate Court or the High Court in the exercise of its powers of revision is entitled to set aside an order under Section 4 or 5 and in lieu thereof pass sentence on such offender according to law. The legislature has clothed this Court with such powers. The only restriction placed upon the powers of this Court is that it shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted. It is, therefore, not necessary to remand the case to the trial Court for awarding sentence.

28. It has been lastly submitted by Mr. Shelat that this Court could only award the sentence which would be a non-appealable sentence. This argument is without any basis. The provisions of sub-section (2) of Section 7 of the Act clearly indicate that this Court has been empowered to pass sentence according to law. The only restriction is that this Court cannot pass a sentence higher than the sentence that might have been awarded by the trying Magistrate. It is significant to note that the offender has been given a right to appeal against the order of conviction even though sentence awarded was not passed, and he was released on probation of good conduct. It is, therefore, evident that he has not been prejudiced in any manner in regard to his right of appeal, as no sentence was awarded by the trying Magistrate and was released on probation of good conduct.

29. All the submissions made by Mr. Shelat fail. The last question that survives for consideration is what is the proper and adequate sentence that should be awarded to opponent No. 2 who has been convicted of an offence punishable under Section 326 of the Code. The nature of injury, the weapon used and the part selected for causing injury, are important factors to be taken into consideration.

30. Dr. Raval, Ex 19, had examined injured Bhagwanji soon after the incident at about 9-30 p.m. on 7th October, 1968. The incident had taken place at about 8-30 p.m. He found the following injury:

"(1) Oblique incised wound 3" x 1/2" x bone deep on the middle of the head, fracture suspected"

The injury could be caused by a sharp cutting instrument. He is corroborated by the certificate, Ex 20, given by him.

31. Dr. Mankad, Ex 21, attached to Junagadh Civil Hospital, had examined

injured Bhagwanji on that very night at about 11-00 p.m. According to him, the patient was serious. He was admitted in the hospital. Arrangement was made also for recording the dying declaration.

32. Dr. Sitapara, Ex 24, in charge of Male Surgical Ward, Junagadh Civil Hospital, states that injured Bhagwanji was admitted in his ward and the patient was referred to the Surgeon, and as per the advice, X-Ray was taken on 8th October, 1968. It was taken by Dr. R. C. Popat. There was fracture of skull of the right parietal frontal region. That X-Ray plate has been produced at Ex 26. The injured was treated by this doctor from 7th October, 1968 to 4th November, 1968.

33. Dr. Popat has been examined at Ex 30. He has stated that he found fracture of the skull of the right parietal frontal bone on taking X-Ray. It was not a minor one. He is corroborated by the documents, Exs. 25 and 26.

34. Dr. Sitapara, Ex 24, has also deposed that the injury was deep to the brain and hence the injured had an attack of paralysis. The other cause might be of cerebral tension. The injury was caused to Bhagwanji when Bhagwanji asked the accused not to beat one Ambalal with an axe. Taking into consideration these circumstances, it is a case which would undoubtedly require awarding of substantive sentence of imprisonment.

35. The learned trying Magistrate has observed in his judgment that the accused is a young man. His age appeared to be 25 years. According to him, the accused had no bad antecedents and he did this act in anger. Taking into consideration those circumstances in favour of the accused and other circumstances referred to above, I think that sentence of one year's rigorous imprisonment and a fine of Rs 125/- for the offence punishable under Sec 326 of the Indian Penal Code, would meet the ends of justice. Mr. Mehta fairly stated that this sentence would meet the ends of justice, especially in view of the fact that the learned trying Magistrate had given a benefit of releasing opponent No. 2 on probation of good conduct. The revision petition, therefore, succeeds.

36. The order regarding payment of fine is made, keeping in mind that compensation of Rs 125/- was awarded to injured Bhagwanji. That amount was to be paid by opponent No. 2 to that injured person by way of compensation. That order has been probably passed by the learned trying Magistrate, keeping in mind the provisions of Section 6 of the Act, as the order regarding releasing opponent No. 2 on probation of good conduct is set aside, it will not be proper to maintain that order of compensation. It is true that notice had not been given to

the injured person regarding this revision petition. If out of the fine that be recovered, Rs 125/- are ordered to be paid to injured Bhagwanji, injured Bhagwanji will not be prejudiced in any manner. Furthermore, taking into consideration the seriousness of the offence committed by opponent No. 2, sentence of one year's rigorous imprisonment and sentence of fine of Rs. 125/- and in default of payment of fine, to undergo two months' further rigorous imprisonment, would meet the ends of justice.

37. The revision petition is allowed. The order passed by the learned trying Magistrate releasing opponent No. 2 on probation of good conduct and the order awarding compensation of Rs 125/- to injured Bhagwanji, are set aside and in lieu thereof, opponent No. 2 (original accused No. 2) is sentenced to suffer one year's rigorous imprisonment and to pay a fine of Rs. 125/- and in default of payment of fine, to undergo two months further rigorous imprisonment, for the offence punishable under Section 326 of the Indian Penal Code.

38. Out of the fine, if recovered Rs 125/- are ordered to be paid to the injured (Bhagwanji). Rule is made absolute.

Revision allowed.

1970 ORI. L. J. 1359 (Vol. 76, C. N. 360) =
AIR 1970 GUJARAT 218 (V 57 C 36)

SHELAT, J.

Kantilal Damodardas, Appellant v State of Gujarat, Respondent.

Criminal Appeal No 198 of 1967, D/- 2-7-1969, against order of City Magistrate, 5th Court, Ahmedabad in Criminal Case No. 1327 of 1966.

(A) Criminal P. C. (1898), S. 156 — Information of cognizable offence — State law in action — Entitles Police Officer to investigate.

It makes no difference whether that information was reduced to writing or not at that particular stage. That may be an irregularity committed but the fact remains that the authority and power to inquire or to investigate begins (Para 7)

(B) Criminal P. C. (1898), S. 157 — Investigation — What amounts to.

Section empowers the Police Officer in charge of a police Station to investigate any information received, from which he has reason to suspect the commission of an offence which he is empowered to investigate. (Para 7)

Where in an application it is alleged that a public servant acted unlawfully in carrying out a search of premises by col-

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luding with the owner of the house searched, that would certainly give reason to suspect that there was a commission of an offence either by the public servant or by the person whose house was searched or by both. Any further step taken by a Police Officer in that connection would amount to investigation. (Para 7)

(C) Penal Code (1860), S. 182 — Information — Must be one falling under S. 151 — Subsequent statement during inquiry or investigation cannot be basis of offence under S. 182.

Giving of any information for any such purpose mentioned in Section 182 can only be one falling under Section 151, Criminal P. C. Any subsequent statement in the further enquiry or investigation of any such information already received cannot be the basis for any offence falling under Section 182. (Para 8)

Such statements being under Sec 162, Criminal P. C cannot be used for any other purpose but those mentioned in Section 162. AIR 1947 Pat 64, Rel on.

(Para 8)

(D) Bombay Police Act, 1951 (22 of 1951), S. 64 — Duties of Police Officers — No authority to obtain or to record statements — "Information" meaning of.

Under Section 64 the duty of a Police Officer is to obtain intelligence concerning the commission of cognizable offence, and to lay information before superior officers. He has no authority to obtain or record statements of persons in respect of any such cognizable offence. (Para 9)

The 'information' contemplated in this section is the 'first information' which leads the police to take action.

(Para 9)

Cases Referred: Chronological Paras
(1947) AIR 1947 Pat 64 (V 34) =
48 Cri LJ 264, Sudarshan
Barhambhat v. Emperor 8

B H Desai, for Appellant, K M. Chhaya, Asstt Govt. Pleader, for Respondent

JUDGMENT:— A short, yet an interesting question that arises for consideration in this appeal is as to whether the statement Ex 13 of the accused which came to be recorded by Mr Erulkar, the Police Officer, giving out information therein about his having given illegal gratification to the extent of Rs 200/- to Mr. Desai, Superintendent of Excise, was a statement falling within the ambit of Section 162 of the Criminal P. C and if so, whether the same can be made the basis of a complaint against him for an offence under Section 182 of the Indian Penal Code

2. The facts giving rise to this prosecution are quite simple. The accused happened to be the proprietor of Rajkamal Stores situated in Bhadra in the City of

Ahmedabad. The premises of the Stores were raided on 13-10-1962 by Mr. Ishverlal Chotubhai Desai, the Superintendent, Prohibition and Excise, with the assistance of other officers and on a search carried out, various articles were seized. Some of those articles were in the nature of bottles containing Eau-de-cologne, tincture Hemidesni, Kawath etc. Though they were attached, samples therefrom were not given to the accused. Some time after one Chaturbhuj B. Acharya of Ahmedabad sent an application to Shri Medh, Deputy Superintendent of Police, Anti-Corruption Bureau, Ahmedabad, inter alia stating that Mr. Desai had concluded with the accused and had deliberately not given samples to the accused in contravention of the circular issued by the Director of Prohibition and Excise so as to enable the accused to escape from the consequences of his being in unlawful possession of alcoholic preparations. That application was received on 13-12-1962 by Mr. Medh. Mr. Medh thereupon directed Mr. Erulkar, the P. S. I to make an inquiry. While making inquiry Mr. Erulkar recorded the statement of the accused on 3-1-1963. That statement is Ex 13 and it contained some allegations against Mr. Desai. The material allegation in respect of which this action is taken against him is that on 13-10-1962 when his Rajkamal Stores was raided and various articles seized therefrom by Mr. Desai and others, Mr. Desai had put him in fear and demanded some bribe from him. On his giving assurance that in future he will not be harassed, he gave a sum of Rs. 200/- by way of illegal gratification to Mr. Desai. That statement bore the signature of the accused. Finding the allegations of a very serious character against a high official such as Superintendent of Prohibition and Excise, Mr. Erulkar told Mr. Medh that he cannot make further inquiry. Consequently Mr. Medh directed one Mr. Rana to make further inquiry in respect thereof. That inquiry was carried out and a report was submitted by Mr. Rana. In his view, the allegations made against Mr. Desai by this accused were false and that he should be prosecuted for an offence under Section 182 of the Indian Penal Code. On the basis of that report, it appears that the complaint against Shri Chaturbhuj as also against this accused was filed. Since there arose some technical defect, the case against this accused was separated and after the trial was over, the accused in that case, namely, Chaturbhuj B Acharya was acquitted. The judgment thereof is produced in the case. It is dated 20-10-1966.

3. Thereafter Mr Medh filed a complaint against this accused in the Court of the City Magistrate, 5th Court, Ahmedabad for the same offence under Sec 182 of the Indian Penal Code in respect of the

same allegations made by him in his statement of 3-1-1963 before the P. S. I. Erulkar of the Anti-Corruption Bureau, against Mr. Desai since they were found to be false. To that charge levelled against him, the accused denied to have committed any offence. He, however, admitted about his having given a statement on 3-1-1963 before P. S. I. Erulkar wherein those allegations against Mr. Desai were made. But, according to him, the statement was not read over to him and that he had recorded in any manner as he chose. He has led no evidence in defence. The learned Magistrate after considering the effect of the evidence adduced in the case found that the allegations made by the accused were false and that he must be presumed to have had knowledge that the officers of the Anti-Corruption Bureau would be induced to make inquiries into the matter and that it would land Mr. Desai in serious trouble. He, therefore, found the accused guilty for an offence under Section 182 of the Indian Penal Code and sentenced him to suffer simple imprisonment for a period of three months and to pay a fine of Rs. 500/-, or, in default, to suffer simple imprisonment of 1½ months. Feeling dissatisfied with that order passed on 28-2-1967 by Mr. N. R. Tatia, City Magistrate, 5th Court, Ahmedabad, the accused has come in appeal.

4. The fact about Mr. Erulkar having recorded a statement of the accused on 3-1-1963 as also about the same containing serious allegations against Mr. Desai about his having been paid Rs. 200/- by way of illegal gratification is not in dispute. The falsity thereof or the purpose with which the same is said to have been made is also not challenged before this Court. The contention, however, raised by Mr. Batubhai Desai, the learned advocate for the appellant-accused, is that this statement falls within the ambit of the provisions contained in Section 162 of the Criminal P. C. and when that is so, it cannot be used for any purpose other than contemplated therein so as to make the same as a basis for the prosecution of the accused under Section 182 of the Indian Penal Code. According to him, the statement could have been either recorded while making an inquiry or investigation in respect of any complaint relating to either a cognizable offence or a non-cognizable offence. Since the offence in respect of which the inquiry was put in action was in the nature of a cognizable offence, namely, the offence falling under Section 161 of the Indian Penal Code or so, the statement of the accused recorded during the course of that inquiry falls within Section 162 of the Criminal P. C. If it related to any non-cognizable offence, the permission of the Magistrate was essential to be obtained before investigating into the same and since no such permis-

sion was obtained, the P. S. I. had no authority to record any statement of the accused under Section 155(2) of the Code. In any view of the case therefore, it was contended, that this was not a complaint or information as such under Section 154 of the Criminal P. C. so as to be the basis of an action under Section 182 of the Indian Penal Code if it is found to be false. But if it was in pursuance of any further inquiry or investigation in relation thereto, the recording of the statement of such person would be under Sections 160 and 161 of the Criminal P. C. and that would fall under Section 162(1) of the Criminal P. C. On the other hand, it was urged by Mr. Chhaya that it was in the nature of a preliminary inquiry that Mr. Erulkar was directed to make on receipt of some application from one Shri Chaturbhuj and that a direction given to him was to make a preliminary inquiry before registering an offence and if any statement was recorded in relation to any such inquiry it would not fall under Section 154 of the Criminal P. C. According to him, it will be falling under Sec 64(b) of the Bombay Police Act, 1951 as applied to the State of Gujarat.

5. From the evidence of Mr. Erulkar it appears that Shri Medh had forwarded an application which he had received from one Chaturbhuj Acharya by his letter No. 4065 of 27-12-1962 for making an inquiry. That application is not proved by examining him, and consequently is not exhibited in the case. It cannot, therefore, be taken as a part of record in the case. Now Mr. Erulkar has averred that in that application which was sent to him for inquiry, the main allegation against Mr. Desai, the Superintendent of Excise was that the accused Kantilal, the proprietor of Rajkamal Provision Stores had given a sum of Rs. 200/- by way of bribe to Mr. Desai and that he had accepted the same at the time when his Stores was raided by Mr. Desai on 13-10-1962. Thus, he was required to make an inquiry with regard to the accusation of this character against Mr. Desai made by a third party in his application dated 11-12-1962. These allegations obviously relate to an offence falling under Section 161 of the Indian Penal Code and such an offence is a cognizable one. It was pointed out by Mr. Chhaya, the learned Assistant Government Pleader for the respondent-State, that the application does not clearly state about the accused having paid Rs. 200/- by way of bribe to Mr. Desai and all that it refers to is that while carrying out the raid of the Rajkamal Provision Stores belonging to the accused, he had colluded with him and while seizing those goods, he had not given the samples thereof and thereby keeping deliberately a loophole the advantage whereof can be obtained by the accused in the event of any prosecution that may,

be launched against him in respect thereof. In other words, it refers to Mr. Desai having not acted according to law in the search carried out by him in that he had acted in collusion with the accused in respect thereof. In face of the evidence of Mr. Erulkar, it is not proper to look at any such complaint which has not been proved and consequently not exhibited in the case. At any rate, on 27-12-1962 when he was asked to make an inquiry he had in his possession the information about Mr. Desai, the Superintendent of Excise, having committed an offence under Sec 161 of the Indian Penal Code and that it was in that connection that the inquiry was directed to be made. It was that way that he went to the place of the accused and recorded his statement marked Ex. 13 on 3-1-1963 wherein those allegations have been made by him against Mr. Desai. This statement covers about 5 or 6 pages and it bears the signature of the accused. The further inquiry in this regard was carried out by Mr. Rana who had also recorded statements of various persons and ultimately in his view the allegations made by the accused in the statement of 3-1-1963 were found to be false and that the action against him under Section 182 of the Indian Penal Code was recommended.

6. The question, therefore, is as to under what provision of law Mr. Erulkar, the P S I had recorded the statement of the accused in this case. Mr. Erulkar was asked as to under what provision of law he had made the inquiry in which he recorded the statement of this accused, and to that his reply is that he cannot say. The inquiry in respect of any offence can be made by a police officer in case it relates to either a cognisable or a non-cognisable offence as contemplated in Chapter XIV of the Criminal P C. Now Mr. Erulkar has, however, admitted that no order of the Magistrate was taken before initiating this inquiry. If the inquiry was in respect of any non-cognisable offence, the permission of the Magistrate was necessary to be obtained by him under Section 155(2) of the Criminal P C. As provided therein, no police-officer can investigate a non-cognisable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate. No such permission was at all obtained.

7. The police officer Mr. Erulkar, therefore, could only have the authority to inquire or investigate into the commission of a cognisable offence under the provisions contained in Chapter XIV of the Criminal P C. Section 154 of the Code provides that every information relating to the commission of a cognisable offence, if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read

over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Any information given, therefore, which relates to the commission of a cognisable offence puts the law in motion, and that entitles the police officer to exercise his authority and powers if he proceeds to inquire or investigate into the same. It makes no difference whether that information was reduced to writing or not at that particular stage. That may be an irregularity committed, but the fact remains that the authority and power to inquire or investigate into any such allegations amounting to a cognisable offence, begins. His action in so doing commences the inquiry or investigation as the case may be. Then comes Section 155 and sub-section (1) thereof relates to information into non-cognisable cases and the investigation in respect thereof. In that event, the police officer may have to enter the information in a book kept for the said purpose and refer the informant to the Magistrate, Sub-section (2) is already referred to and need not be repeated. Sub-section (3) thereof then says that any police-officer receiving such order from a Magistrate may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognisable case. Section 156 relates to investigation into cognisable cases and as provided in sub-section (1) thereof, any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognisable cases which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial, and sub-section (2) thereof says that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. Then Section 157 of the Criminal Procedure Code provides for procedure where cognisable offence is suspected. If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf to

proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary to take measures for the discovery and arrest of the offender. Then there is a proviso thereto with which we are not much concerned. In other words, this section also empowers the police officer in charge of a police station to investigate any information received from which he has reason to suspect the commission of an offence which he is empowered to investigate. It may be stated here that if the application of Mr. Chaturbhui Acharya did not actually disclose the material allegation about Mr. Desai having received illegal gratification of Rs. 200/- from the complainant for a particular purpose, the allegation did amount to his having acted unlawfully in carrying out the search of his premises by colluding with the accused. That would certainly give reason to suspect that there has been a commission of an offence of that character either by the accused or by Mr. Desai or by both of them and that, therefore, they had the authority to investigate into the same. Thereafter leaving Sections 158 and 159 which have reference more or less to the proviso to Section 157 and sub-section (2) thereof, we go to Section 160 whereby the police officer making an investigation under this Chapter has been given a power to require attendance of witnesses. As provided therein, he can require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case and such person shall attend as so required. Then after securing the presence, a police officer making an investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, as provided in sub-section (1) of S. 161. Sub-section (2) thereof then says that such person is bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. Sub-section (3) then says that the police officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records. It would appear therefrom that he can examine orally any person supposed to be acquainted with the facts and the circumstances of the case and any such person will be bound to answer the same, but the police officer may at the same time reduce into writing any statement made to him in the course of an examination

under this section. Then comes the material Section 162 which runs thus—

"162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872, and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, Cl (1) of the Indian Evidence Act, 1872, or to affect the provisions of Section 27 of that Act."

It would appear therefrom that such a statement if reduced to writing shall not be signed by the person making it and then it says that any such statement or any part of such statement shall not be used for any purpose save as hereinafter provided at any inquiry or trial in respect of any offence under investigation at the time when such statement was made, and the proviso thereto says that such a statement may be used by the accused with the permission of the Court under Section 145 of the Indian Evidence Act. It makes abundantly clear that such a statement if reduced to writing or any part thereof recorded by a police officer in the course of an investigation under this Chapter shall not be used for any purpose other than for contradicting the witness as contemplated in the proviso thereto. It follows therefrom that if the statement in question before the Court is found to be one recorded under Sec 162 of the Criminal P. C., it cannot be used for any purpose other than the one contemplated under Section 162 and that being so, it cannot be made the basis of the complaint under Section 182 of the Indian Penal Code.

8. Now Section 182 of the Indian Penal Code refers to giving of false information with intention to cause public servant to use his lawful power to the injury of another person. It provides as under.—

"182. Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Thus, giving of any information for any such purpose mentioned in Section 182 can only be one falling under Section 154, for, it is that information which leads the police to make an inquiry or investigation in relation to the allegations made therein and that can be done by the police station officer under the provisions contained in Chapter XIV of the Code having regard to the fact that it relates to a cognizable offence or a non-cognizable offence or some offence that he has reason to suspect as contemplated under Section 157 of the Code. Any subsequent statement in the further inquiry or investigation of any such information already received, in my view, cannot be the basis of any offence falling under Section 182 of the Indian Penal Code. In this regard, I was referred to a decision in the case of *Sudarsan Barhambhat v. Emperor*, reported in (1947) 48 Cri LJ 264 = (AIR 1947 Pat 64). The relevant observations in respect of which the reliance was placed run thus:—

"Under Section 182, the information which is penalised is an information which is intended to cause or known to be likely to cause the public servant concerned to take action in one of the ways specified in the section. Here, information within this meaning had already been given and the law had already been set in motion. Further statements made in the course of the investigation would not, to my mind, be further information in this sense."

In other words, any further information in any of such statements recorded after the information was received which set the criminal law in motion cannot be said to be such information which is sought to be penalised under Section 182 of the Indian Penal Code. The machinery was already set in motion and inquiry was set against him. It made no difference whether the offence was registered or not for the simple reason that even such inquiry or investigation may not make much of a difference. The term 'inquiry' has been defined in Section 4(k) of the Criminal

P. C. as including every enquiry other than a trial conducted under this Code by a Magistrate or Court and the term 'investigation' has been defined in S. 4(l) as including all the proceedings for the collection of evidence conducted by a police-officer or by any person other than a Magistrate who is authorised by a Magistrate in this behalf. In any view of the matter, where in the nature of an inquiry or an investigation in pursuance of an application received by Mr. Medh, recorded by any statement by Mr. Erulkar of the accused was one under the powers derived by him under Chapter XIV of the Criminal P. C. and the statement recorded would, thus, in my view, fall within the ambit of Section 162 of the Criminal P. C.

9. Mr. Chhaya, the learned Assistant Government Pleader, invited a reference to Section 64 of the Bombay Police Act, 1951 and sought support for such a statement falling within the ambit of Cl (b) thereof. Section 64 provides as under:

"64. It shall be the duty of every police officer:—

(a) x x x x
(b) to the best of his ability to obtain intelligence concerning the commission of cognisable offences or designs to commit such offences, and to lay such information and to take such other steps, consistent with law and with the orders of his superiors as shall be best calculated to bring offenders to justice or to prevent the commission of cognizable and within his view of non-cognizable offences;

x x x x
This provision sets out the duties of a police officer. Now his duty is to obtain intelligence concerning the commission of cognizable offences or designs to commit such offences and to lay such information before the superior officers for preventing any commission of such offences. This section does not refer to any authority or power given to a police officer to obtain or record statements of person in respect of any such cognisable offences. There is hardly any doubt in the present case that Mr. Erulkar was exercising his power and authority under the provisions of Chapter XIV of the Code. It was for the purpose of making an inquiry or investigation as it were, in respect of information already received from Mr. Chaturbhui Acharya against Mr. Desai in respect of a cognizable offence that he had recorded the statement of the accused. The recording of such a statement of the accused on 3-1-1963 cannot, therefore, be made the subject-matter of a charge against the maker thereof under Section 182 of the Indian Penal Code. The term 'information' contemplated therein is the first information which leads the police to take action against any such person and the subsequent recording or collecting of evidence or any such statement cannot come within

the ambit of Section 182 of the Indian Penal Code for in that event the purpose or intention behind the giving of such information cannot be attributed to him.

10. In the result, therefore, the order of conviction and sentence passed against the accused-appellant is set aside and the accused is acquitted. The fine, if paid, is directed to be refunded to him.

Accused acquitted.

970 CRI. L. J. 1365 (Vol. 76, C. N. 361) =

AIR 1970 JAMMU AND KASHMIR 143
(V 57 C 30)

JANKI NATH BHAT AND JASWANT
SINGH, JJ.

Kundan Lal, Petitioner v. District
Magistrate and another, Respondents.

Writ Petn. No. 58, of 1969, D/- 18-12-1969.

(A) Constitution of India, Articles 370 (1) (e) (d), and 35 (c) — Application of Constitutional provisions to Jammu and Kashmir under Article 370 (1) (e) — Power of the President to make modifications under Article 370 (1) (d) — Power includes power to vary modifications — Section 21 General Clauses Act applies — Modifications in Article 35 (c) — Valid.

There is nothing in Article 370 of the Constitution which would exclude the application of Section 21 of General Clauses Act when interpreting the powers granted to the President under Article 370. The modification in Article 35 (c) of the Constitution of India extending its period from 5 to 20 years and thus saving the provisions of Section 8 of J and K Preventive Detention Act 1964 from being violative of Article 22 (5) of the Constitution of India is therefore, within the power of the President. AIR 1970 SC 1118, Rel. on. (Paras 8, 9)

(B) Public Safety — Constitution (Application to Jammu and Kashmir) Orders, 1959 and 1964 — Jammu and Kashmir preventive laws — Immunity to, from Fundamental Rights granted under Article 35 (c), Constitution of India — Period of immunity extended under the Orders 1959 and 1964 — No infringement of Fundamental Rights in Article 22 — (Constitution of India, Articles 35 (e) and 22).

Under Clause (c) of Article 35 of the Constitution of India immunity was granted to the preventive laws made by the State Legislature completely, though the life of the inconsistent provisions was limited to the period of five years. The extension of that

life from five to ten years in 1959 and ten to fifteen years in 1964 cannot in the circumstances be held to be an abridgement of fundamental rights, as the fundamental rights were already made inapplicable to preventive detention law. (Para 11)

(C) Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Sections 14 and 3 — Detention order under Section 3 — Revocation of, under Section 14 (2) — Revocation for technical defect included — No fresh facts arising after revocation — Fresh order of detention under Section 3 not valid.

The provision of Section 14 (2) of the Act is of wide amplitude and applies to every case of revocation for any reason whatsoever including a technical defect — The provision envisages that no fresh order of detention would be issued against a person when the previous order of his detention is revoked unless new facts warranting the detention have come into existence. A fresh detention order immediately after revocation without new facts would therefore be illegal. AIR 1969 SC 43, Rel. on. (Para 12)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 1118 (V 57) =
W. P. No. 3 of 1968, D/- 10-10-1968,
Sampat Prakash v. State of J. & K. 7
(1969) AIR 1969 SC 43 (V 56) =
1969 Cri LJ 274, Hadibandhu v.
District Magistrate, Cuttack 12

R. P. Sethi, for Petitioner; Addl. Advocate-General, for Respondents.

ORDER:— This is a petition under Article 32 (2-A) of the Constitution of India as applied to the State of Jammu and Kashmir read with Section 103 of the Constitution of the State and Section 491, Criminal Procedure Code for issue of writ of Habeas Corpus directing the release from detention of the petitioner.

2. The material facts leading to this petition are:—

Pursuant to Order No 13/PDA/69 dated 25-7-1969 issued under Section 3 (2) read with Section 5 of the J. and K. Preventive Detention Act, 1964 (hereinafter referred to as 'the Act'), by the District Magistrate, Poonch, respondent No. 1 therein, the petitioner was arrested by the police on 29-7-1969 at 7-15 A. M. and was detained in the Central Jail, Jammu, with a view to preventing him from acting in a manner prejudicial to the security of the State, the maintenance of public order and essential supplies. On the date of the passing of the aforesaid order of detention the District Magistrate also made an order under Section 8 read with Section 13-A of the Act directing that the peti-

tioner be informed that it was against public interest to disclose to him the grounds on which his detention order was made. The order of detention was approved by the Government of Jammu and Kashmir's Order No. ISD-275-A of 1969 dated 1-4-8-1969. On 1-9-1969 the petitioner filed a writ petition in this Court challenging the validity of his detention. During the pendency of the petition, the aforesaid detention order was revoked by the Government vide its Order No. ISD-301 of 1969 dated 19-9-1969 on account of some "technical defect" under Section 11 (1) of the Act. On the same date a fresh Order No. ISD-305 of 1969 directing the detention of the petitioner in the Additional Police Lock Up attached to Sadder Police Station Jammu was issued by the Government under Section 3 (1) (a) (i) of the Act with a view to preventing him from acting in any manner prejudicial to the security of the State. By its No. 306 of 1969 of even date the Government also made an order under Section 8 read with Section 13-A of the Act informing the petitioner that it was against public interest to disclose the facts and to communicate to him the grounds on which his detention had been made.

3. On 16-10-1969 the petitioner filed an amended petition challenging the fresh order of his detention averring that the order was illegal and void as it had been passed mala fide with ulterior motives, that the detention had been ordered without sufficient reasons and satisfaction as to the existence of facts warranting his detention, that the detention was violative of Section 14 (2) of the Act, that the fresh order of his detention could be justified only in case fresh facts had arisen after the date of the revocation of the previous order; that no such new facts had been mentioned by the detaining authority for issue of fresh order of his detention, that the issue of fresh detention order was also illegal and void as no grounds of detention as required by Section 8 of the Act had been supplied to him, that proviso to Section 8 of the Act was unconstitutional, illegal and void because it contravened the provisions of Article 22 of the Constitution of India, that the detention was illegal as he had not been afforded an opportunity of making a representation against the order to the Government as provided by Section 8 of the Act, and that the detention was also illegal as no reference under Section 10 of the Act had been made to the Advisory Board.

4. The petition was resisted by the Government inter alia on the grounds that the previous detention order had been revoked on account of technical defect and by its Order No. ISD-305 of 1969 dated 19-9-1969 it had ordered the detention of the petitioner under Section 3 (1) (a) (i) of the Act, that the petitioner was informed of the revocation of the order of the District Magistrate, Poonch, and in token thereof his signature

was obtained on the order of revocation, that the petitioner was also informed of the fresh detention order and in obedience thereof was detained in the Additional Police Lock up attached in Police Station, Sadder, Jammu, that fresh order of petitioner's detention was passed as the Government was satisfied that with a view to preventing him from acting in any manner prejudicial to the security of the State, it was necessary to do and as the previous order passed by the District Magistrate was found to be defective in law, and that it was also intimated to the petitioner that it was against public interest to disclose to him the facts or to communicate to him the grounds on which his detention order had been made.

5. Mr. Setlu, learned Counsel for the petitioner, has raised the following contentions.

That the Act was not legally in force after the 8th of May, 1969 that the proviso to Section 8 of the Preventive Detention Act is violative of Article 22 (5) of the Constitution of India, that Article 35 (c) added by the President vide Constitution (Appellate to J & K) Order, 1961 with a view to save the provisions of the law relating to preventive detention from being held to be violative of Article 22 (5) of the Constitution of India, is no longer in force as the Article was originally added for a period of five years and the President could not by subsequent orders raise the period from 5 years to 20 years, that the President having once specified the modifications and exceptions subject to which certain provisions of the Constitution were applicable in relation to the State and these provisions having become applicable to the State, it was not within the competence of the President to make any amendment therein by means of a subsequent order, that fresh order for the petitioner's detention was violative of Section 22 of the Preventive Detention Act, that no new facts had come into existence after the revocation of the previous order warranting the making of a fresh order of detention and as such the detention was void and invalid, that detention of the petitioner was violative of Section 8 of the Preventive Detention Act as the petitioner was not afforded an opportunity of making representation against the order of detention, that the order was mala fide and that the fresh detention order had not been served on the petitioner.

6. Raizada Amar Chand, the learned Addl Advocate-General appearing on behalf of the Government has produced a copy of the J and K Preventive Law (Amendment) Act 1969 (Act No. XXXI of 1969). In view of this Act, the first contention raised on behalf of the petitioner has no force and is, therefore rejected.

7. The second contention of the learned Counsel for the petitioner that the proviso

to Section 8 of the Preventive Detention Act was violative of Article 22 (5) of the Constitution of India and the President having once added Article 35 (c) to the Constitution of India in relation to the State for a period of five years it was not open to him to amend it subsequently and consequently the Act was not immune from challenge has also no force. This point is concluded by the decision of the Supreme Court in *Samat Prakash v. State of J. and K.*, Writ Petn. No. 3 of 1968 which was rendered on 10-10-68 = (AIR 1970 SC 1118). In this judgment similar contention advanced on behalf of the detenu was elaborately dealt with and repelled by their Lordships in the following words:—

“The next submission made for challenging the validity of the Orders of modification made in the years 1959 and 1964 was that, under sub-clause (d) of Clause (1) of Article 370 of the Constitution, the power that is conferred on the President is for the purpose of applying the provisions of the Constitution to Jammu and Kashmir and not for the purpose of making amendments in the Constitution as applied to that State. The interpretation sought to be placed was that, at the time of applying any provision of the Constitution to State of Jammu and Kashmir, the President is competent to make modifications and exceptions therein, but once any provision of the Constitution has been applied, the power under Article 370 would not cover any modification in the constitution as applied. Reliance was thus placed on the nature of the power conferred on the President to urge that the President could not from time to time amend any of the provisions of the Constitution as applied to the State of Jammu and Kashmir. It was further urged that the President's power under Article 370 should not be interpreted by applying Section 21 of the General Clauses Act, because constitutional power cannot be equated with a power conferred by an Act, rule, by-law, etc.”

8. The argument, in our opinion, proceeds on an entirely incorrect basis. Under Article 370 (1) (d) the power of the President is expressed by laying down that provisions of the Constitution other than Article (1) and Article 370 which, under Article 370 (1) (c) became applicable when the Constitution came into force, shall apply in relation to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify. What the President is required to do is to specify the provisions of the Constitution which are to apply to the State of Jammu and Kashmir and when making such specification he is also empowered to specify exceptions and modifications to those provisions. As soon as the President makes such specification, the provisions become applicable to the State with the specified exceptions and modifica-

tions. The specification by the President has to be in consultation with the government of the State if those provisions relate to matters in the Union List and the concurrent List specified in the Instrument of Accession governing the accession of the State to the Dominion of India as matters with respect to which the Dominion Legislature may make laws for that State. The specification in respect of all other provisions of the Constitution under sub-clause (d) of Clause (1) of Article 370 has to be with the concurrence of the State Government. Any specification made after such consultation or concurrence has the effect that the provisions of the Constitution specified with the exceptions and modifications become applicable to the State of Jammu and Kashmir. It cannot be held that the nature of the power contained in this provision is such that Section 21 of the General Clauses Act must be held to be totally inapplicable.

9. In this connection it may be noted that Article 367 of the Constitution lays down that unless the context otherwise requires the General Clauses Act, 1897, shall subject to any adoptions and modifications that may be made therein under Article 372, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. This provision made by the Constitution itself in Article 367, thus, specifically applied the provisions of the General Clauses Act to the interpretation of all the Articles of the Constitution which include Article 370. Section 21 of the General Clauses Act is as follows.—

“Where, by any Central Act or Regulation a power to issue notification, orders, rules, or by-laws is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.”

This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this Section is fully applicable to all the provisions of the Constitution. As an example, under Article 77 (3), the President, and, under Article 166 (3), the Governor, of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions Section 21 of the General Clauses Act is not applied, the result

would be that the rules once made by the President or a governor would become inflexible and the allocation of the business among the Ministers would for ever remain as laid down in the first rules. Clearly the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying Section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to, amend, vary or rescind any of those rules. The submission that Section 21 of the General Clauses Act cannot be held to be applicable for interpretation of the Constitution must, therefore, be rejected. It appears to us that there is nothing in Article 370 which would exclude the applicability of this Section when interpreting the power granted by that Article.

10. The legislative history of this Article will also fully support this view. It was because of the special situation existing in Jammu and Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu and Kashmir under Article 394, under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision the situation might demand an exception or modification of the provision applied, but subsequent changes in the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making order from time to time under Art. 370 and this power must, therefore, be held to have been conferred on him by applying the provisions of Section 21 of the General Clauses Act for the interpretation of the Constitution.

11. Lastly, it was argued that the modifications made in Article 35 (c) by the Constitution (Application to Jammu and Kashmir) Orders of 1959 and 1964 had the effect of abridging the fundamental right of the citizens of Kashmir under Article 22 and other articles contained in Part III after they had already been applied to the State of Jammu and Kashmir, and an order of the President under Article 370 being in the nature of law, it would be void under Article 13 of the Constitution. Article 35 (c) as originally introduced in the Constitution

as applied to Jammu and Kashmir laid down that no law with respect to preventive detention made by the Legislature of that State could be declared void on the ground of inconsistency with any of the provisions of Part III with the qualification that such a law to the extent of the inconsistency was to cease to have effect after a period of five years. This means that, under clause (c) of Article 35, immunity was granted to the preventive laws made by the State legislature completely, though the life of the consistent provisions was limited to a period of five years. The extension of that life from five to ten years and ten to fifteen years cannot, in these circumstances be held to be an abridgement of any fundamental right, as the fundamental rights were already made inapplicable to the preventive detention law. On the other hand if the substance of this provision is examined, the proper interpretation would be to hold that as a result of Article 35 (c) the applicability of the provisions of Part III for the purpose of judging the validity of a law relating to preventive detention made by the State Legislature was postponed for a period of five years, during which the law could not be declared void. As already stated Article 370 (1) (d) in terms, provides for the application of the provisions of the Constitution other than Articles 1 and 370 in relation to Jammu and Kashmir with such exceptions and modifications as the President may by order specify. It was not disputed that the President's Order of 1954 by which immunity for a period of five years was given to the State's Preventive Detention law from challenge on the ground of its being inconsistent with Part III of the Constitution, was validly made under and in conformity with clause (d) of Article 370 (1). We have already held that the power to modify in clause (d) also includes the power to subsequently vary, alter, add to, or rescind such an order by reason of the applicability of the rule of interpretation laid down in Section 21 of the General Clauses Act. If the Order of 1954 is not invalid on the ground of infringement or abridgement of fundamental rights under Part III it is difficult to appreciate how extension of period of immunity made by subsequent amendments can said to be invalid as constituting an infringement or abridgement of any of the provisions of Part III. The object of the subsequent Orders of 1959 and 1964 was to extend the period of protection to the preventive detention law and not to infringe or abridge the fundamental rights, though the result of the extension is that a detenu cannot during the period of protection, challenge the law on the ground of its being inconsistent with Article 22. Such extension is justified *prima facie* by the exceptional state of affairs which continue to exist as before.

12. Regarding the third point Mr. Amar Chand has submitted that Section 14 (2)

does not apply to a case where fresh detention order is issued on account of some technical defect. This contention is, in our opinion, wholly devoid of substance. Section 14 (2) reads as follows:—

“The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Government or an officer, as the case may be, is satisfied that an order should be made.”

A bare perusal of the provision would be enough to show that it is very wide in amplitude and applies to every case of revocation for any reason whatsoever including a technical defect. The provision envisages that no fresh order of detention would be issued against a person where the previous order of his detention is revoked unless new facts warranting the detention have come into existence after the date of revocation. We are fortified in this view by a decision of the Supreme Court in *Hadibandhu Das v. District Magistrate Cuttack*, AIR 1969 SC 43 where it was laid down as follows:—

“In terms *Section 13 (2) authorises the making of a fresh detention order against the same person against whom the previous order has been revoked or has expired, in any case where fresh facts have arisen after the date of revocation or expiry on which the detaining authority is satisfied that such an order should be made. The clearest implication of Section 13 (2) is that after revocation or expiry of the previous order, no fresh order may issue on the grounds on which the order revoked or expired had been made.

The power of the detaining authority must be determined by reference to the language used in the statute and not by reference to any predilections about the legislative intention. There is nothing in Section 13 (2) which indicates that the expression “revocation” means only revocation of an order which is otherwise valid and operative; apparently it includes cancellation of all orders invalid as well as valid. The Act authorises the executive to put severe restrictions upon the personal liberty of citizens without even the semblance of a trial, and makes the subjective satisfaction of an executive authority in the first instance the sole test of competent exercise of power. Courts are not concerned with the wisdom of the Parliament in enacting the Act or to determine whether circumstances exist which necessitate the retention on the statute book of the Act which confers upon the executive extraordinary

power to detention for long period without trial. But the Courts would be loath to attribute to the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent. The word “revocation” is not capable of a restricted interpretation without any indication by the Parliament of such an intention.

The very fact that a defective order has been passed or that an order has become invalid because of default in strictly complying with the mandatory provisions of the law bespeaks negligence on the part of detaining authority and the principle underlying Section 13 (2) is the outcome of insistence by the Parliament that the detaining authority shall fully apply its mind to and comply with the requirements of the statute and of insistence upon refusal to countenance slipshod exercise of power.”

As admittedly no new facts came into existence after the revocation of the previous detention order, the present detention of the petitioner based on Order ISD-305 of 1969 is clearly illegal. In this view of the matter, we think it unnecessary to express an opinion on the other points raised before us.

At this stage the Additional Advocate-General has brought to our notice that the detenu has since been released. In view of this submission of the learned Additional Advocate-General, the petition has become infructuous and shall be consigned to records.

Order accordingly.

1970 CRI. L. J. 1369 (Vol. 76, C. N. 362) =
AIR 1970 SUPREME COURT 1765 (V 57 C 376)

(From: Goa)*

S. M. SIKRI AND I. D. DUA, JJ.

Uttam Bala Revankar, Appellant v. Asstt. Collector of Customs and Central Excise, Goa and another, Respondents.

Criminal Appeal No 20 of 1970, D/- 3-8-1970.

Goa, Daman and Diu (Laws) Regulation (12 of 1962), S. 8 — Order No. G. A. D. 74/63/25007 D/-6-11-1968 of Lt. Governor is not ultra vires.

Order applying the existing law to proceedings for offences committed

*(Cri. Misc Appeal No. 19 of 1969, D/- 25-8-1969—Goa).

IN/IN/D730/70/MKS/B

*This corresponds to Section 14 (2) of the Jammu and Kashmir Preventive Detention Act, 1964.

14. In the result the appeal is allowed, the judgment and order of the Judicial Commissioner set aside and that of the learned Sessions Judge restored.

Appeal allowed.

1970 ORI. L. J. 1372 (Vol. 76, C. N. 363) =

AIR 1970 MANIPUR 73 (V 57 C 21)

R. S. BINDRA, J. C.

Government of Manipur, Petitioner v. R. K. Lukhoisana Singh s/o Khuraiakpa of Yaikul, Respondent

Criminal Ref. Case No 45 of 1966, D/- 15-12-1969.

(A) Eastern Bengal and Assam Excise Act (1 of 1910), Ss. 65, 3(8), 8 and 53 — Police sub-inspector not invested with powers under S. 8 is not excise Officer — Has no authority under S. 65 to launch prosecution under S. 53.

In the absence of any order or notification of the Government appointing Sub-Inspectors of Police in the Territory of Manipur as Excise Officers, a Sub-Inspector of Police who is not invested with powers under Section 8 has no authority under Section 65 to launch prosecution against the accused under Section 53 of the Act (Para 2)

(B) Eastern Bengal and Assam Excise Act (1 of 1910), Ss. 65, 8 — Order dated 4-5-1959 of Chief Commissioner, Manipur — Police Sub-Inspector authorised to exercise powers under S. 65 without investing him with powers under S. 8 — Order is invalid.

The order dated 4-5-1959 of the Chief Commissioner, Manipur merely purporting to empower Police Officers not below the rank of Sub-Inspector to initiate proceedings under Section 65 (1) (a) (b) of the Act without appointing them as excise officers under Section 8 is not valid in law. Under Section 65 a Magistrate can take cognizance of an offence punishable under Section 53 of the Act only on the complaint or report of an Excise officer. Therefore, unless the Police Sub-Inspector is appointed as an Excise officer under Section 8 of the Act, the Chief Commissioner could not have legally given power

to him (Sub-Inspector) to initiate prosecutions under Section 53 of the Act

(Paras 3, 4)

(C) Civil P. C. (1908), Pre. — Interpretation of Statutes — Power given to do a certain thing in certain way — Other methods cannot be adopted. (Para 4)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 621 (V 56) =
(1969) 2 SCJ 322, State of Gujarat v. Shantilal Mangaldas

(1936) AIR 1936 PC 253 (2) (V 23) =
37 Cri LJ 897, Nazir Ahmad v. King Emperor

X Yotombi Singh, Public Prosecutor, for Petitioner, A Nilamani Singh, for Respondent.

ORDER:— This reference under Section 432(1) of the Criminal P. C. made by Shri Th. Gunamani Singh, Sub-divisional Magistrate, Imphal West, respecting two excise cases pending in his Court under Section 53(a) of the Eastern Bengal and Assam Excise Act, 1910, hereinafter called the Act, raises the question whether Sub-Inspector of Police has the legal authority to launch prosecutions under that provision of the Act. The Sub-Divisional Magistrate has expressed the opinion in the negative.

2. The prosecution in each case was launched by a Sub-Inspector of Police and the authority for the initiation of proceedings by a Police Officer, it is contended on behalf of the State, is derived from the order dated 4th of May 1959 made by the Chief Commissioner, Manipur. That order shall hereinafter be mentioned as the Order. The subject of initiation of prosecutions is dealt with in Section 65 of the Act. It is provided therein, inter alia, that no Magistrate shall take cognizance of an offence punishable under Section 53 of the Act except on his own knowledge or suspicion, or on the complaint or report of an Excise officer. Therefore, the precise point that falls for determination in this reference is whether a Sub-Inspector of Police is an Excise officer within the meaning of the Act. The expression Excise officer is defined in Cl (9) of Section 3 of the Act to mean a Collector or any officer or other person appointed or invested with powers under Section 8. Shri Ibotombi Singh, the Government Advocate, was unable to cite any order or notification of the Government appointing Sub-Inspectors of Police in the Territory of Manipur as Excise officers. Therefore, prima facie the

Sub-Inspector of Police had no authority to launch prosecution against either of the two accused under Section 53 of the Act.

3. The Government Advocate urged however, that the order dated 4th of May 1959 can be read to mean and imply that Police officers not below the rank of Sub-Inspector are Excise officers for the purposes of the Act. The opening words of the Order are as under—

"In exercise of the powers conferred by portions hereinafter mentioned of the Eastern Bengal and Assam Excise Act, 1910 (Eastern Bengal and Assam Act I of 1910) as extended to this Territory, the Chief Commissioner, Manipur, is pleased to make the following orders"

In the relevant operative part of the Order it is mentioned inter alia that the Police officers not below the rank of Sub-Inspector "may exercise all the powers and perform all the duties conferred and enjoined" by Section 65 (1) (a) and (b) of the Act. I have stated above that a Magistrate can take cognizance of an offence punishable under Section 53 of the Act only on the complaint or report of an Excise officer. Therefore, unless the Police Sub-Inspector is appointed as an Excise officer under Section 8 of the Act, the Chief Commissioner could not have legally given power to him (Sub-Inspector) to initiate prosecutions under S 53 of the Act. The Order nowhere mentions that the Police Sub-Inspectors are appointed as Excise officers under the Act. It will be noticed that the appointment of various officers contemplated by the Act can be made only under Section 8 of the Act, and since without taking recourse to that provision of the Act the Chief Commissioner purported to empower the Police officers not below the rank of Sub-Inspector to initiate proceedings under Sec 65 (1) (a) (b) of the Act, that investiture cannot be described as valid in law. I may emphasise that in the opening words of the Order (reproduced above) it is specifically mentioned that powers were conferred on the various Police Officers in exercise of the authority "conferred by portions hereinafter mentioned of the Eastern Bengal and Assam Excise Act", and the "portions" of the Act mentioned in the body of the Order do not include Section 8 of the Act. And since no Police Officer could be appointed as Excise Officer without exercise of authority given by Section 8 of the Act it is apparent that Sub-Inspectors of Police have not so far been appointed as Excise Officers

4. I deem it appropriate to make a brief reference to another argument raised by Shri A. Nilamani Singh, the Advocate representing the accused. That argument is based on the provisions of Cls (c) and

(d) of sub-section (2) of S. 8 of the Act. The relevant part of the provisions may be excerpted as under:

(2) The Provincial Government may, by notification, applicable to the whole of the territories to which this Act applies or to any district or local area comprised therein—

(a)

(b)

(c) appoint officers of the Excise Department of such classes and with such designations, powers and duties under this Act, as the Provincial Government may think fit;

(d) order that all or any of the powers and duties assigned to any officer under Cl (c) of this section shall be exercised and performed by any servant of the Crown or any other person,

It was contended by Shri Nilamani Singh that the Provincial Government must appoint Excise officers and give them designations and specify their powers and duties under Cl (c), before proceeding to make an order under Cl (d) that all or any of the powers and duties assigned to any officer of Excise Department under Cl (c) shall be exercised and performed by any servant of the Provincial Government or any other person. In other words, what Shri Nilamani Singh contended was that Government employees of Departments other than Excise can be given powers only after such powers have been conferred upon the personnel of the Excise Department. This contention appears to be quite weighty because Cl (d) specifically enjoins that the Provincial Government can vest powers in its servants belonging to non-Excise Departments only in reference to the powers given and duties assigned to any officer of the Excise Department under Cl (c). Obviously, if the officers are not appointed to the Excise Department or powers are not vested in them, then no action can be taken under Cl (d). It would, therefore, appear that the Chief Commissioner had issued the order dated 4th of May 1959 without first taking the necessary preliminary steps envisaged by Cl (c). It is a settled rule of interpretation of Statutes that where power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. Reference is invited in this connection to the decision in *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2). The Supreme Court has also held likewise in the case of *State of Gujarat v. Shantilal Mangaldas*, AIR 1969 SC 634. Since in the instant case the Chief Commissioner happened to vest Sub-Inspectors of Police with powers under the

Act not in the manner provided by S. 8, that investiture is not valid in law.

5. Before concluding I may observe that by an order dated 29th of January 1969, published in the Manipal Gazette dated 10th February 1969, the Chief Commissioner has conferred powers under the various sections in the Act on the Excise officers mentioned therein. Therefore, the Chief Commissioner can now very conveniently confer powers on the officers of the Police Department in exercise of his authority under Cl (d) of S. 8(2) of the Act. It is, therefore, suggested that the Chief Commissioner may now do so to facilitate the working of the Act. A copy of this judgment should be sent to the Government.

6. As a result of the conclusions recorded above, I accept the reference and quash the prosecutions in both the cases. If the Government still wants to prosecute the two accused, it may do so afresh in accordance with the provisions of law.

Reference accepted

1970 CRI. L. J. 1374 (Vol. 76, C. H. 384) =

AIR 1970 ORISSA 176 (V 57 C 54)

G K MISRA, C J AND S. K RAY, J.

Santosh Kumar Mohapatra and another, Petitioners v. State of Orissa and another, Opposite Party

O J C Nos 1006 and 1007 of 1969, D/- 21-12-1969

Public Safety — Preventive Detention Act (1950), S. 3 — Activities prejudicial to maintenance of public order — Connotation and test of.

An order under Section 3 can be passed to prevent a person acting in any manner prejudicial to maintenance of public order. Public order is the even tempo of the life of a community in various systems of life. When the activities of a person disturb not merely the life of the individual but the even tempo of the life of the community, the disturbance caused by those activities amounts to the breach of public order. The test for satisfaction is to assess the effect, both actual and potential of the activities, violent or non-violent, motivation by high ideology or excitement by laudable reformatory spirit do not neutralize prejudice to public order. AIR 1970 SC, 1228, Rel on

(Paras 11, 12)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 269 (V 57) =

Writ Petn. No. 102 of 1969, D/- 4-8-1969, Shyamal Chakraverty

v Commr of Police, West Bengal 9

(1970) AIR 1970 SC 852 (V 57) =

Writ Petn. No. 179 of 1968, D/-

7-11-1968 = 1970 Cri LJ 852,

Pushkar Mukherjee v State of

West Bengal 9

(1970) AIR 1970 SC 1228 (V 57) =

Writ Petn. No. 287 of 1969, D/-

2-12-1969, Arun Ghosh v State

of West Bengal 9, 10

(1966) AIR 1966 SC 740 (V 53) =

1966-1 SCR 708 = 1966 Cri LJ

608, Dr Ram Manohar Lohia v

State of Bihar 9

M/s P. Palit, J. Patnaik, B. C. I. Ray, U. P. Mohanty, N. Kar and R. Pradhan for Petitioners, Advocate-General and S. N. Mitra, for Opposite Party

RAY, J.:— Santosh Kumar Mohapatra is the petitioner in O. J. C. No. 1006/69. He was taken into custody by the police acting under Section 151 of the Cr. P. C. and was produced before the Sub-Divisional Officer, Berhampur, on 21-7-69. The Magistrate remanded him to jail custody. Subsequently he was released on bail on 21-8-69. He was re-arrested at the jail gate and detained by Order No. 2316/69 dated 21-8-69 passed by the District Magistrate, Ganjam, in exercise of powers conferred on him by Section 3(2) of the Preventive Detention Act, 1950 (4 of 1950). The petitioner was arrested under this detention order on 21-8-69. The grounds for detention were served on the petitioner on 25-8-69, under Section 7 of the Preventive Detention Act. The petitioner made a full and complete representation, through a personal hearing before the Advisory Board which was of opinion that there was sufficient cause for detention of the petitioner. The Government of Orissa thereafter confirmed this detention order in exercise of the powers conferred under sub-section (1) of Section 11 of the Preventive Detention Act and directed continuance of his detention for 12 months with effect from 22-8-69. Thereafter the present petition for issuance of a Writ of Habeas Corpus was filed on 14-11-69.

2. Bhagirathi Misra is the petitioner in O. J. C. No. 1007/69. He was arrested by the police under Section 151, Cr. P. C. and produced before the Magistrate on 21-7-69. The Magistrate remanded him to jail custody. Subsequently he was released on bail. While coming out of jail, he was again apprehended on 21-8-69 at the jail gate on the authority of an order, No. 2314/69 dated 21-8-69 passed by the District Magistrate, Ganjam, in exercise of powers conferred on him by Section 3 (2) of the Preventive Detention Act, 4 of 1950. This order of detention was served on the petitioner that very day, and he was furnished with the grounds of detention on 25-8-69 under Section 7 thereof. This detenu made his representation through a personal

hearing to the Advisory Board which expressed its opinion that there was sufficient cause for his detention. On receipt of the report of the Advisory Board, Government of Orissa confirmed the detention order in exercise of powers under Section 11 (1) of the Act and directed continuance of the said detention for a period of twelve months from the date of detention. Hence this petition was filed under Article 226 of the Constitution of India and under Section 491, Cr. P. C. on 14-11-69 for an order directing his release.

3. The detention order in respect of each of these two petitioners is in identical term. One such detention order is, therefore, extracted herein below for reference.

"Whereas I Shri R. C. Patra, I. A. S. District Magistrate, Ganjam, am satisfied that with a view to preventing Sri Bhagirathi Misra, B.A., son of Sri Budhinath Misra, Bijipur Tota Sahi, P. S. Berhampur town, District Ganjam, from acting in any manner prejudicial to the maintenance of public order, it is necessary to make the following order:

Now, therefore, in exercise of the powers conferred by sub-section (2) (a) of Section 3 of the Preventive Detention Act, 1950. (Act 4/50), read with Section 4 thereof, I Shri R. C. Patra, I. A. S. District Magistrate, Ganjam, hereby direct that the said Shri Bhagirathi Misra be detained in the circle Jail, Berhampur, until further orders."

4. Both these two petitions have been analogously heard as same contentions have been advanced on behalf of each petitioner. This judgment, therefore, will govern these two cases.

5. The grounds of detention served on each petitioner comprise one main ground, and five sub-grounds. They are identical in each case. Each sub-ground has been particularised and made specific by detailing various activities indulged in by the petitioners. For the purpose of convenience, the grounds of detention containing numerous particulars are reproduced in two schedules, one in respect of each case, appended to the foot of this judgment. Schedule I sets out the grounds in respect of the petitioner in O. J. C. 1006/69 and Schedule II reproduces the grounds in respect of the petitioner in O. J. C. 1007/69.

6. Three contentions have been raised by learned counsel for the petitioners. They are, (i) The grounds on which the detention order was made have no bearing upon the question of maintenance of public order. The activities alleged against the petitioners can at most be regarded as prejudicial to law and order and as such, the detention of the petitioners with a view to preventing them from acting in any manner prejudicial to

the maintenance of public order, cannot be justified.

(ii) the particulars of the grounds which purport to demonstrate the past conduct or antecedent history of the petitioners on which the competent authority has ostensibly acted, are not proximate in point of time and have no rational connection with the satisfaction of the said competent authority that a detention order is called for; and (iii) Some of the grounds are vague and as such, the entire detention order is liable to be quashed.

7. Before dealing with the contentions, it is essential to notice the object and requirement of Section 3 of the P. D. Act, so far as they are relevant for our present purpose. The detention order is passed by the authorities enumerated therein in exercise of powers conferred thereunder. As a condition precedent to making an order for preventive detention with respect to any person, the detaining authority must be satisfied that the said person should be prevented from acting in any manner prejudicial to the maintenance of public order. Such satisfaction must obviously be reached on a consideration of the activities of the person against whom the detention order is to be made. Those activities must be of a period anterior to the point of time when the authority decides to make the detention order. The nature of such activities must be such as, in their essential quality or in their potentiality would have effect on public order. Since the liberty of a citizen is sought to be taken away as a preventive measure in the interest of the community or the public at large, law enjoins that the grounds of such detention must be supplied to the detenu to enable him to make effective representation to the Government and the Advisory Board which is empowered to give its opinion as to the sufficiency of the cause for detention and send a report thereof to the appropriate Government. After perusing the report the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

8. The subject of preventive detention has been judicially discussed almost threadbare, and many principles have been evolved and settled while adjudicating upon the validity or invalidity of the detention order. The present contentions have been canvassed within the ambit of those principles.

9. The first submission is that the activities alleged against the petitioners are not subversive of public order, but are mere disturbances of law and order leading to disorder. It is now well settled that there is distinction between the connotation of 'law and order' and 'public order'. This distinction and the connota-

tion of the expression 'public order' have been elaborated upon by the Supreme Court in a number of cases

The latest case on this point cited at the Bar is a decision (not yet reported) given on 2-12-1969 in Writ Petn. No. 287 of 1969 = (Since reported in AIR 1970 SC 1228) (Arun Ghosh v. State of West Bengal). In this case the earlier decisions of the Supreme Court made in (1966) 1 SCR 709 = (AIR 1966 SC 740) (Dr Ram Manohar Lohia v. State of Bihar); an unreported case decided on 7-11-1968 in Writ Petition No. 179 of 1968 = (Since reported in AIR 1970 SC 852) (Pushkar Mukherjee v. State of West Bengal), and another unreported case decided on 4-8-1969 in Writ Petn No. 102 of 1969 = (Since reported in AIR 1970 SC 269) (Shyamal Chakraverty v. Commr. of Police, West Bengal) have been noticed and considered

10. The best exposition on this subject is to be found in the decision of the learned Chief Justice of the Supreme Court in the case of Writ Petn. No. 287 of 1969, D/-2-12-1969 = (AIR 1970 SC 1228). Nothing better can be done than to quote extensively from the decision of the Supreme Court in the case of Arun Ghosh referred to above. This is, what, the learned Chief Justice has said

"Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another, but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even

have grace with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests woman in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquillity who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society.

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A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr. Ram Manohar Lohia's case examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is

Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed. This question has to be faced on every case on facts"

11. Thus the 'public order' envisages the even tempo of the life of the community taking the country as a whole or even a specified locality. It involves the conception of an organised life of a community, a society or a people in a collective sense territorially integrated in which various systems operate, system of administration, system of justice, system of education, system of commerce and business and the like. Such a collective life has a manner of activity of its own which is quite distinct from the life of individuals who comprise the community, the society or the people. Upheaval in the life of an individual or a family scarcely affects community life or public life except where the association of a particular individual or the family with the community or national life is so deep

that their personal character has practically ceased to exist. A stronger force is required to cause ripples in the life stream of a community than in the life of an individual or a family. That is why it has been said in many cases that stray acts directed against individuals are not subversive of public order and that it is the degree of disturbance and its effect upon the life of community in a locality which determines whether the disturbance amounts only to a breach of law and order or breach of public order. But prima facie it is difficult to conclude from the mere gravity of an act or the degree of disturbance that there has been violation of public order and not of law and order. Therefore, it has been laid down in Arun Ghosh's case that the test in each case when preventive detention order is made is to assess the effect both actual and potential of the acts of the detenu on the life of the community. If the actual or potential effect is to throw or tend to throw out of gear any system in the life of a community in any area, it would affect public order.

12. Fundamental rights of freedom of speech and expression, to assemble peaceably and without arms and to form associations or unions are always subject to reasonable restriction in the interest of public order imposed by law. Violent or non-violent, if an activity has the effect or upsetting the even tenor and tempo of life of a community, it is said to affect public order. It does not matter if the activity is motivated by high ideology or excited by laudable reformatory spirit. For instance, if black-marketeers are dragged out and whipped in public streets, or houses of rich people are systematically raided and money and articles taken therefrom are distributed amongst the poor, or on plea of changing the system of education or imposing one's own idea on the system students are incited or forced to boycott classes and lecturers are prevented from teaching or in the name of socialism, fields of big landlords are trespassed upon and paddy grown thereon is forcibly cut and removed, all these activities will have the tendency of introducing element of fear and insecurity in the minds of the large section of the public and thereby affecting public order. So also non-violent Satyagraha before public offices and educational institutions and lying down on railway lines to prevent running of trains are activities which have the tendency to cause upheaval in the even tempo of the life of a community. There may also be cases where acts against individuals may have adverse effect on the public tranquillity. Instances, by way of illustration, have been cited in Arun Ghosh's case. Thus, the even tempo of the life of a community may be affected from

various aspects. The question whether a particular activity has disturbed the public order or has caused merely a breach of law and order is always a question of degree and the extent of its reach upon the society.

It is therefore pertinent to enquire how grave are the activities comprised in the grounds and how extensively the society is affected by them either singly or cumulatively, so that the even tempo of life is disturbed. While doing so, we must assume for the present that all the particulars of the past conduct and antecedent history of the petitioners are not vague and are admissible ingredients for assessment by the detaining authority.

13. Coming to the case of Santosh Kumar Mohapatra, petitioner in O. J. C. No. 1006 of 1969, it will be seen that he has been habitually indulging in various activities from 1964 till 13-7-1969 as disclosed by the five grounds, duly particularised and served on him, as reproduced in Schedule 1 to this judgment. The object of the petitioner's various acts has been set out in grounds A, B, C, D, and E. The petitioner is directly associated with each act, sometimes alone, and sometimes with associates. His activities showed that he upset the peaceful atmosphere in various educational institutions, forced hartals in Berhampur town, incited students to illegal activities, aided adoption of unfair means in university examinations by criminally intimidating invigilators. He with his associates trespassed into shops and forced sales of goods at what he thought was fair price. He forced hartals and in every activity of his he exhibited violent conduct. He fomented linguistic and communal tensions affecting prejudicially the peaceful co-existence of people belonging to different communities and speaking different mother-tongues. He burnt and destroyed Christian churches. He carried out anti-Telugu and anti-Bengali activities. If it suited his whim, he insulted ladies by making indecent remark. He, in short, wanted to establish himself as a strong man of the locality whose will was to be respected and carried out. He wanted to place himself above law. It is not difficult to imagine that his activities affected the student community, the business community, administrative and police authorities in Ganjam District. He openly declared that he would retaliate against the police by resorting to Naxalite type of activities. There is no doubt that the petitioner disturbed the public tranquillity in various spheres of the life of the community habitually right upto 13-7-1969 which indicated that he is likely even in the future to act in a manner prejudicial to the public order. He has directed many of his violent acts against individuals but those activities in con-

junction with his other misdeeds add upto a situation where public order and tranquillity is disturbed

14. So far as petitioner Bhagupathi Misra in O. J. C. No 1007/69 is concerned, his past conduct and antecedent history relates to the period from 1964 to 13-7-69. The grounds of detention are of the same nature as some of the grounds in regard to the petitioner Santosh Kumar Mohapatra. The only difference is that the number of activities of Santosh is more. Both of them indicate the same tendency to act in a manner prejudicial to public order. Thus, in our opinion, the grounds of detention have a direct bearing on the question of maintenance of public order and activities of the detenus detailed therein are clearly prejudicial to maintenance of public order. The first contention, therefore, fails.

15. The second contention is that the past conduct and antecedent history of the detenus are not proximate in point of time and have no rational connection with the satisfaction of the detaining authority. It is clear from an analysis of Section 3(1) (a) of the P. D. Act that past conduct or antecedent history of a person can be taken into account at the time of making the detention order, because, it is common place that the tendency, inclinations or proclivities of the detenu are largely and clearly indicated from such antecedent history and prior conducts and they also lend a valuable clue to the future propensities of the detenu. They afford invaluable material to the detaining authority to reach his satisfaction as to whether the detenu would act in future in a manner which would be prejudicial to the maintenance of public order. It is while past conduct or antecedent history is taken into account by the competent authority acting under Section 3 of the Act that the other doctrine that such past conduct or antecedent history must be proximate in point of time and have rational connection with the satisfaction reached by him comes into operation. It does not require much argument to appreciate that past conduct of the detenu, if not proximate in point of time, cannot reasonably lead to an inference that the tendency of the detenu is to act in a manner prejudicial to the public order in future. Unless such an inference is reached there would be nothing to prevent the detenu from doing to maintain public order and action under Section 3 of the Act will be unjustified. But keeping in mind the reasons for that rule, it is quite obvious that when the detenu has been acting prejudicially to the public order continuously and repeatedly since a long time in the past upto the present, the entire antecedent history may be taken into account and that such past conduct has patently

a rational connection with the satisfaction that the authority is to reach under Section 3(1) of the Act. This contention, therefore, fails.

16. The third and the last contention is that the grounds are vague. It is now well settled that if the grounds are vague, then the detention order cannot be maintained because the detenu by reason of the vagueness of the grounds is deprived of his constitutional right under Article 22(5) of the Constitution of making effective representation against his detention. So, if out of a number of grounds of detention, one is vague and the detenu, is, on that account, deprived of his right of making representation against that ground, his detention is liable to be quashed notwithstanding that the other grounds are good grounds, because in that case, it is impossible to predicate as to how the mind of the detaining authority might have acted by exclusion of the one ground found to be vague.

We have gone through the particulars one by one in each case. The particulars set forth in the grounds in respect of each petitioner implicate him and references therein to the date, place and the overt act are reasonably sufficient to give him notice of the matter with which he is charged. The petitioners are told what they did, when and where they did it. From the nature of the act imputed to him it is not possible to fill in all details and lack of such details does not make the grounds vague so as to virtually deprive the detenu of his statutory right of making an effective representation. In our opinion, there is no substance in this contention.

17. We are, therefore, satisfied that the acts of the petitioners amount to breaches of public order and their past conduct indicates a tendency or inclination on their part from which it is reasonable to infer that they are likely to act in a manner prejudicial to the maintenance of the public order. In the circumstances the order of preventive detention must be maintained.

These two writ applications are accordingly dismissed.

18. G. K. MISRA, C. J.: I agree
Writ applications dismissed.

1970 ORI. L. J. 1378 (Vol. 76, C. N. 365) =

AIR 1970 ORISSA 184 (V 57 C 60)

G. K. MISRA, C. J. AND S. K. RAY, J.
Mandalapu Sundar Narayan and others,
Petitioners v. V. V. Chennulu, Opposite Party.

Criminal Reference No. 24 of 1969, D/-
5-1-1970

EN/FN/C405/70/MLD/T

(A) Criminal P. C. (1898), Section 117 (3) — Inquiry in security proceedings — Order of Magistrate directing to execute interim bond without recording reasons — Order is liable to be quashed.

An order of Magistrate under Sec. 117 (3) directing to execute interim bond without recording reasons is liable to be quashed. The Magistrate must apply his judicial mind to the facts of the case, record his reasons in writing, and then call for an interim bond. The reasons need not be elaborate or detailed. All the same the order in writing must show ex facie that the reasons were considered and the Magistrate was satisfied. AIR 1967 Orissa 133, held, correctly decided.

(Paras 6, 18)

(B) Criminal P. C. (1898), Section 117 (3) — Inquiry in security proceedings — Order directing to execute interim bond — When can be made — Expression “pending completion of inquiry under sub-section (1)” — Meaning.

In security proceedings a Magistrate can direct to execute interim bond even prior to the commencement of enquiry under Sec. 117 (1) if the other conditions precedent are fulfilled, namely, that there is an emergency and the Magistrate, on application of his judicial mind for reasons to be recorded in writing comes to the conclusion that an interim bond should be furnished. AIR 1967 Orissa 133 held, correctly decided.

(Para 16)

The expression “pending completion of the inquiry under sub-section (1)” merely fixes the completion of the enquiry as the terminus, after which the power under Section 117 (3) cannot be exercised and gives a mandate for exercise of the power before the inquiry is completed. The expression also takes within its sweep an enquiry which is not yet commenced but which has been ordered under Section 112. Thus the expressions would mean either pending the completion of the enquiry started in pursuance of Section 112 or ordered to be held but not yet started. Case law discussed. (Para 14)

Cases Referred: Chronological Paras

- (1969) AIR 1969 Pat 369 (V 56) = 1969 Cri LJ 1420, R P. Chowdhury v. State 14
 (1968) 1968 Cri LJ 844 = 34 Cut LT 391, Udaya Nath Mansingh v. State 6
 (1967) AIR 1967 Orissa 133 (V 54) = 33 Cut LT 386 = 1967 Cri LJ 1166, Satyanarayan Gantayat v. State 3, 4, 6, 7, 8, 14, 16, 17
 (1966) AIR 1966 Orissa 75 (V 53) = 32 Cut LT 742 = 1966 Cri LJ 432, Upendra Nath Kanungo v. State 6, 8
 (1966) 32 Cut LT 515 = 1966-8 OJD 60, Dibakar Pradhan v. State 6, 11
 (1963) 1963 (1) Cri LJ 663 = 4 Guj LR 490, State of Gujarat v. Sama Kasan Sidhik 14

- (1962) AIR 1962 Pat 51 (V 49) = 1962 (1) Cri LJ 181, Amir Singh v. State 8
 (1959) AIR 1959 Mad 339 (V 46) = 1959 Cri LJ 998, Thirunavukkarasu v. State 14
 (1958) AIR 1958 Raj 349 (V 45) = 1958 Cri LJ 1546, Luxmial v. Bherulal 14
 (1957) AIR 1957 Pat 106 (V 44) = 1957 Cri LJ 386, Jagdish Prasad v. State 14
 (1955) AIR 1955 Andhra 96 (V 42) = 1955 Cri LJ 779 In re, Venkatasubba Reddy 14
 (1953) AIR 1953 Cal 238 (V 40) = 1953 Cri LJ 574, Dulal Chandra Mandal v. State 14
 (1952) AIR 1952 Trav-Co 262 (V 39) = 1952 Cri LJ 1111, Jallaluddin Kunju v. State 14
 G Rath, (Amicus curiae), for Petitioners; Y. S. N Murty, for Opposite Party.

G. K. MISRA, C. J.:— Petitioner and opposite party belong to the same street in Jeypore town. Petitioner No. 2 is the mother and petitioner, No. 3 is the wife of petitioner No. 1. Petitioner No. 7 is the father-in-law of Petitioner No. 1 and Petitioners 4 to 6 are the sons of petitioner No. 7. It is said that about 3.30 p.m. on 13-10-67 the son of petitioner No. 1 pushed a young Sindhi boy riding on a cycle as a result of which he fell down. This took place in front of the house of the opposite party and the opposite party chided the son of petitioner No. 1. Petitioners 2 and 3 abused the opposite party in insulting language. At about 6.30 p.m. the opposite party was restrained and assaulted in the house of petitioner No. 1. The matter was reported at the police station, but no action was taken. The opposite party thereupon filed a complaint on 19-10-67 before the Magistrate, First Class, Jeypore, alleging commission of certain criminal offences and the same is pending. The inaction on the part of the Police encouraged the petitioners to indulge in further threats and aggression. The opposite party heard petitioners 2 and 3 talking with other females, that the opposite party would be chastised further and he shall have to run to the police station again. As a result of this the opposite party was unable to stir out of his house. A petition was accordingly filed under Section 107, Criminal Procedure Code to bind down the petitioners as their action created an apprehension of breach of peace. On this petition the learned Magistrate passed the following order on 24-10-67.—

“The petitioner V. V. Chenulu of Mahanipeta, Jeypore, files a petition under Section 107, Criminal Procedure Code, along with an application to call on the counter-petitioners (opposite party) to execute interim bonds pending enquiry. From a perusal of the petition I am satisfied that there is

likelihood of a breach of peace and this is a case of emergency. Issue notice to the counter-petitioners (opposite parties) fixing 6-11-1967 calling on them to show cause why they should not be bound for a term of six months in a sum of Rs. 500/- each to keep the peace. Also issue notice under Section 117, Criminal Procedure Code to the counter petitioners (opposite parties) to execute interim bonds pending enquiry for a certain amount with one surety each."

2. On 6-11-67 all the petitioners were present except petitioners 2 and 3 who appeared through an Advocate. After hearing the learned Advocates, the Magistrate directed the petitioners to execute bonds of Rs. 100/- each under Section 117 (3), Criminal Procedure Code with one surety for a like amount, to maintain peace pending the completion of the enquiry, in default, to be detained for a period of 6 months. Against the learned Magistrate's order dated 21-10-1967 Criminal Revision Petition No. 29 of 1969 was filed by the petitioners before the Sessions Judge, Jaypore, who allowed the revision and made a reference to this Court for quashing the proceedings of the learned Magistrate for non-compliance with the provisions of Sections 112 and 117 (3) of the Criminal Procedure Code. The learned Sessions Judge held that the Magistrate had recorded no reasons in writing and mechanically passed the order under Section 117 (3), on the very day he passed the order under Section 112 and in such circumstances he was of opinion that calling upon the petitioners to furnish interim bonds was contrary to law.

3. This reference came up for hearing before Mr. Justice R. N. Mishra. On 4-11-1969 he passed the following order

"At the hearing, Mr. Murty appearing for the opposite party, brings to my notice a decision of this Court reported in 33 Cut LT 386 = (AIR 1967 Orissa 133). Satvanarayan Gantavat v State. This decision seems to be running counter to a series of Single Judge decisions of this Court on the subject-matter. It is, therefore, proper to refer this matter to be placed before a Division Bench for a determination as to whether this Single Judge decision should be followed as good law. Since the proceeding arises out of a case under Section 117 (3), Criminal Procedure Code it is proper, that the case should be expeditiously disposed of. Place this before my Lord the Chief Justice for fixing an early date for hearing."

This is how the reference has been heard by this Division Bench.

4. It is necessary at this stage to examine the points that were decided in 33 Cut LT 386 = (AIR 1967 Orissa 133). In that case, the learned Sub-Divisional Officer, on a consideration of the Police report, passed a composite order by which he took action both under Section 112 and Sec 117 (3), Criminal Procedure Code. The facts are there-

fore similar to the facts before us. There two questions were raised before the learned Chief Justice

(i) Whether a composite order passed both under Section 112 and Section 117 (3) before the persons appeared was within jurisdiction; and

(ii) Whether the order was liable to be quashed because it was not a reasoned order.

The learned Chief Justice answered the first question holding that it was within the jurisdiction of the Magistrate to pass an order under Section 117 (3) on the very same day on which he passed the order under Section 112 and that an order under Sec. 117 (3) need not await the starting of an enquiry under Section 117 (1). On the second question he held that before passing an order under Section 117 (3) the Magistrate is bound to apply his judicial mind to the facts of the case and give a reasoned order in writing. With reference to the particular facts of that case, however, the learned Chief Justice was of the view that though the order of the learned Magistrate could have been more definite and express, yet the order contained good reasons read in the light of the materials that were present before the Magistrate.

5. The question for consideration is, whether on either of these two points there is any other decision of this Court to the contrary.

6. So far as the second point is concerned, the decisions of this Court are uniform. The law is that the Magistrate must apply his judicial mind to the facts of the case, record his reasons in writing, and then call for an interim bond. The interim bond cannot be called upon merely by mechanical application of the mind. Regarding this principle there is no divergence of opinion, though Judges have come to different conclusions with regard to the facts and circumstances of each case. The matter was fully discussed in (1966) 32 Cut LT 515, Dibakar Pradhan v. State, where all the previous decisions were noticed. The same view was also taken in 32 Cut LT 742 = (AIR 1966 Orissa 75), Upendra Nath Kanungo v State and 34 Cut LT 391 = 1968 Cri LJ 844, Udaya Nath Mansingh v State.

On the second question, therefore our conclusion is that there is no divergence of opinion of this Court and the learned Chief Justice laid down the law correctly in 33 Cut LT 386 = (AIR 1967 Orissa 133). It need hardly be stated that the ultimate conclusion in different cases would depend upon the facts and circumstances of each case. An order under Section 117 (3), Criminal Procedure Code can be passed even on the Police report itself if the Magistrate, after a critical application of his mind, comes to the conclusion that a case of emergency has been made out.

7. On the first question there is no other decision of this Court and 33 Cut LT 386 = (AIR 1967 Orissa 133) ploughs a lonely furrow. The statement in the referring order that it runs counter to a series of decisions is not correct. The learned Advocates for both parties, after full opportunity was given to them for research, did not dispute this position.

8. Though there is no other decision of this Court on the question whether an order under Section 117 (3) can be passed before the commencement of an enquiry under Section 112 (1) there is conflict of authority in the different High Court in India. In support of his conclusion on the first point the learned Chief Justice in 33 Cut LT 386 = (AIR 1967 Orissa 133) relied on 32 Cut LT 742 = (AIR 1966 Orissa 75) and AIR 1962 Pat 51, *Amir Singh v. State*. With respect, we must observe that neither of these cases throws any light on this point.

In 32 Cut LT 742 = (AIR 1966 Orissa 75) the order under Section 117 (3) was passed after the appearance of the members of the second party. They appeared on 30-4-1964, though an application was filed by the members of the first party for execution of interim bonds by the second party on 25-4-1964. On 6-5-1964 the parties were heard on the question of execution of interim bonds by the members of the second party. Thus, no notice was issued to the members of the second party calling upon them to execute interim bonds before the commencement of the enquiry under Section 117 (1). This case does not therefore support the conclusion of the learned Chief Justice.

Similarly, AIR 1962 Pat 51 is also distinguishable on facts. There the contention was that an order under Sec. 117 (3) can only be passed after the Magistrate has started taking evidence under Section 117 (1). This contention was negatived because an enquiry under Section 117 (1) starts even before taking of evidence. The opposite parties in that case were not called upon to furnish interim bonds prior to their appearance, under Section 117 (1).

The learned Chief Justice was wrong in placing reliance on the aforesaid two decisions in support of his conclusion on the first point.

9. Before examining the conflict of authorities it would be useful to make an analysis of the relevant provisions and the scheme of the Criminal Procedure Code in Chap VIII. In this connection Sections 112, 113, 114 and 117, so far as they are relevant, require examination. They run thus:

"112. When a Magistrate acting under Section 107, Section 108, Section 109 or Section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the

number, character and class of sureties (if any) required.

113. If the person in respect of whom such order is made is present in Court it shall be read over to him, or if he so desires, the substance thereof shall be explained to him.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear or when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court:

Provided that whenever it appears to such Magistrate upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

117 (1). When an order under Section 112 has been read or explained under Section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under Section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be, practicable, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases.

(3) Pending the completion of the enquiry under sub-section (1), the Magistrate if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section 112 has been made, to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him or in default of execution, until the inquiry is concluded.

10. It would thus appear that when a Magistrate acting under Section 107, Criminal Procedure Code deems it necessary to require any person to show cause, he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties, if any, required.

11. In (1966) 32 Cut LT 515 at p 516 it was indicated that the expression "substance of the information" means details of overt acts. Information cannot stop short at mere

generalisation of the nature of such acts. A person should be supplied with the substance of the overt acts for his information though it may not be necessary to give all possible details. The object of this requirement is that the person proceeded against would clearly understand the matter in respect of which he has to show cause. An order under Section 112 is in the nature of a charge and should contain the substantial particulars upon which the information is based.

In (1963) 32 Cut LT 515 at p. 516, the effect of non-compliance with such requirement was also considered. Failure to comply with the requirement was held to be a grave and substantial irregularity and rendered it necessary for the appellate and revisional Courts to carefully scrutinize the proceedings. It was indicated therein that the omission does not however ipso facto vitiate the proceeding without proof of prejudice. The proceeding would not be one without jurisdiction, but it can be quashed if prejudice is shown to have occurred.

12. Section 113 lays down the procedure in respect of persons present in Court. If the person in respect of whom an order under Section 112 has been made is present in Court, the order shall be read over to him or if he so desires the substance thereof shall be explained to him. If such person is not present in Court the Magistrate shall issue summons or warrant under Section 111. The proviso to Section 111 prescribes for the arrest of persons if a case of emergency is made out. The condition precedent to take action thereunder is that there is reason to fear the commission of breach of the peace, and such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person. In such a case a warrant of arrest may be issued by the Magistrate.

13. The enquiry into the truth of the information starts with Section 117 (1) though the proceeding starts with the order passed under Section 112. A distinction has been kept between starting of a proceeding and commencement of enquiry. The enquiry cannot start unless the person in respect of whom an order under Section 112 has been passed is present in Court, or when he is not present his presence is procured under Section 114. Section 117 (1) expressly lays down that it is only after the appearance of the person in respect of whom an order under Section 112 has been passed that the Magistrate shall proceed to enquire into the truth of the information upon which action had been taken under Section 112. He would also proceed to take such further evidence as may appear necessary. There is no conflict of view that the proceeding starts with an order passed under Section 112 and the enquiry commences under Section 117 (1) after the appearance of the person proceed-

ed against. The enquiry would also commence even if the person served with a summons under Section 114 does not appear on the date fixed. That will be commencement of an ex parte inquiry.

Section 117 (2) does not throw much light on the question. It merely says that the enquiry shall be made in the manner prescribed for conducting trials and recording evidence in summons cases as nearly as may be practicable.

13A. The crucial expression which has given rise to conflict of judicial opinion is found in Section 117 (3) — "Pending completion of the inquiry under sub-section (1)". There is no conflict regarding the fulfilment of the other conditions precedent before the Magistrate takes action under Section 117 (3). The other conditions are:

(a) Immediate measures are necessary for prevention of breach of peace or disturbance of public tranquillity or the commission of an offence or for public safety.

(ii) The reasons are to be recorded in writing.

14. The question is what construction is to be given to the expression "pending completion of the enquiry" under sub-section (1). One view is espoused in AIR 1957 Pat 106, Jagdish Prasad v. State. Their Lordships observed thus:

"It is only when the person is present in Court or has been brought before the Court that the Magistrate can take into consideration whether circumstances do exist for taking immediate measures, and when he is fully satisfied that such circumstances do exist then only he can direct the execution of an ad interim bond. But before taking recourse to Section 117 (3) he has to put his reasons in writing. It is manifestly clear that Section 112 and Section 117 provide two different procedures for two different ends and, therefore, a Magistrate has no jurisdiction to pass an order under Section 117 (3) along with one under Section 112. An emergency order under Section 117 (3) can only be made when the Magistrate has started to enquire into the truth of the information under Section 117 (1) and in the course of that enquiry he considers that immediate measures are necessary".

This view is supported by the majority of the High Courts. See AIR 1952 Trav-Co 262, Jallaluddin Kunju v. State, AIR 1955 Andhra 96, In re, Venkatasubbiah, AIR 1958 Raj 349, Luxmial v. Bherulal and AIR 1969 Pat 369, R. P. Chowdhury v. State.

In support of the contrary view, Mr. Murty cited AIR 1953 Cal 238, Dulal Chandra Mandal v. State and AIR 1959 Mad 339, Thrunavukkarusu v. State. In the Calcutta case the petitioner was present in the Court and on the same day the proceedings drawn up against him under Section 112 were explained to him and thereafter steps were taken under Section 117 (3). Thus, interim bond was called upon to be executed after the

commencement of the enquiry. This case throws no light on the point in issue. Similarly, AIR 1959 Mad 339 is not applicable.

The only decision which fully supports Mr. Murthy's contention is 4 Guj LR 490 = 1963 (1) Cri LJ 663, *State of Gujarat v. Sama Kasan Sidhuk*. In 33 Cut LT 386 = (AIR 1967 Orissa 133) the learned Chief Justice did not closely examine the meaning of the expression "pending completion of the enquiry under sub-section (1)". According to the majority view, there must be commencement of an enquiry under Section 117 (1), and Section 117 (3) can be resorted to only thereafter. This analysis puts a narrow construction on the expression. The expression merely fixes the completion of the enquiry as the terminus, after which the power under Section 117 (3) cannot be exercised, and gives a mandate for exercise of the power before the enquiry is completed. As was rightly observed in the Gujarat case, an enquiry which has not been started is also an enquiry which is not completed. The expression also takes within its sweep an enquiry which is not yet commenced but which has been ordered under Section 112. Thus the expression would mean either pending the completion of the enquiry started in pursuance of Section 112 or ordered to be held but not yet started. As it involves a case of emergency, there is no justification for giving a restricted construction to the aforesaid expression. On a plain reading of logical analysis, we are inclined to accept the Gujarat view as laying down the correct law.

15. In support of the majority view, Mr. Rath contended that if a case of emergency arises prior to an enquiry under Section 117 (1), the Magistrate can issue a warrant of arrest under the proviso to Section 114. This argument leads nowhere. The provision for issuing a warrant of arrest in extreme cases of emergency prior to the commencement of an enquiry under Section 117 (1) does not obviate the necessity for calling for an interim bond under Section 117 (3). Issue of warrant of arrest is an extreme step and is not ordinarily resorted to prior to the appearance of the person proceeded against. Calling upon a person to execute an interim bond is less rigorous. Even a warrant of arrest issued under the proviso to Section 114 may be subsequently recalled and an interim bond may be called upon to be furnished after the enquiry was started as sponsored under the majority view. If this is so, it is difficult to imagine why an interim bond cannot be asked to be furnished even prior to the starting of the enquiry. At any rate, the scheme of the Chapter and the plain language of Section 117 (3) do not justify a narrow construction.

16. We are therefore clearly of opinion that if the other conditions precedent are fulfilled, namely that there is an emergency and that the Magistrate, on application of his

judicial mind for reasons to be recorded in writing comes to the conclusion that an interim bond should be furnished, there is no reason why Section 117 (3) would not be made applicable prior to the commencement of the enquiry under Section 117 (1).

Though the learned Chief Justice in 33 Cut LT 386 = (AIR 1967 Orissa 133) did not elaborate this aspect of the matter, we agree with his ultimate conclusion on the first point and hold that it lays down the law correctly.

17. To sum up we hold that both the points that arose for consideration in 33 Cut LT 386 = (AIR 1967 Orissa 386) were correctly decided.

18. We would now examine whether the order passed by the learned Magistrate on 24-10-1967 can be supported on the aforesaid principles. The Magistrate had before him an application filed by the opposite party. Therein all the facts were narrated as to how the opposite party was restrained and assaulted by the petitioners. The Magistrate, however, did not set forth the substance of the information received by him; nor did he send a copy of the petition filed before him along with the notice to show cause. The Magistrate does not appear to have applied his judicial mind to the facts of the case, nor did he record his reasons in writing. It is understandable that the reasons need not be elaborate or detailed. All the same the order in writing must show *ex facie* that the reasons were considered and the Magistrate was satisfied.

On the facts of this case we are of opinion that the Magistrate was not justified in calling for execution of interim bonds. The proceeding under Section 112 cannot however be quashed.

19. On the aforesaid analysis, the reference made by the learned Sessions Judge for quashing the proceeding under Section 117 (3) is accepted while the reference in so far as it relates to the quashing of the proceeding under Section 112, is discharged. It is open to the learned Magistrate to take further steps under Section 117 (3) if the necessary conditions still exist.

20. RAY, J.:— I agree.

Reference answered accordingly.

1970 CRI. L. J. 1383 (Vol. 76, C. N. 366) =
AIR 1970 PUNJAB & HARYANA 450
(V 57 C 68)

GOPAL SINGH, J.

Raunki Saroop, Appellant v. State, Respondent

Criminal Appeal No 768 of 1968, D/- 3-4-1969 from order of S. J. Ambala, D/- 6-6-1968.

(A) Penal Code (1860), S. 366— Kidnaping or abducting a female — Taking away must be against her will.

KM/EN/F851/69/HGP/C

Where a girl of about 18 years and studied upto matric, left her parent's house alone at about 10 p. m. when the accused was nowhere near her but latter on she came across him on the way and on his invitation she, after a little hesitation, went with him to the Railway Station, travelled with him by train and Bus up to his place of residence and stayed at his quarters for five days like a house wife.

Held, that she was not removed from lawful guardianship of her parents.

(Para 14)

(B) Penal Code (1860), S. 366 — Kidnaping or abducting a female — Age of girl — Proof — Entry in school certificate not reliable, with implicit faith as against medical evidence — Test of epiphyses on basis of fusion being scientific test would be acceptable — If there be conflicting evidence as to age, benefit of uncertainty as to age of the girl should be given to accused — (Evidence Act (1872), S. 45).

(Paras 15, 16)

Baldev Kapur as amicus curiae, for Appellants, R K Chhokar, for Advocate General Haryana, for Respondent

JUDGMENT: This is appeal by Raunki Saroop from the judgment of the Sessions Judge, Ambala dated June 6, 1968 convicting the appellant under Section 366, Indian Penal Code and sentencing him to rigorous imprisonment for one year.

2. The prosecution case is that Smti Mohani Kumari lives with her father Dial Chand in Ambala Cantt. There is a temple in the Cantt. The appellant used to play harmonium at the time kirtan was recited in the temple. Smti. Mohani Kumari visited the temple in the company of her mother. Mother of Smti Mohani Kumari arranged kirtan at her house. The appellant participated in it. This happened couple of months before the date of occurrence, which came off on October 13, 1967.

3. On the night between October 13 and 14, 1967, Smti Mohani Kumari was sleeping in the house. It was 10.00 p. m. Krishan Lal neighbour of Dial Chand knocked the door of his own house. Smti Mohani Kumari got awakened as a result of knocking of the door of the house of whom. Lal. She left the house and proceeded to see drama, which was going on at the Mandi in the Cantt. It is stated by her that the appellant met her near Ganda Nullah and on his request to accompany him, she at first declined but later agreed to accompany him to Bhiwani, where the appellant said he was employed as professor of Music. Both of them proceeded to the Railway Station at Ambala Cantt, and got into a train for Delhi. They reached Delhi the following morning.

4. The appellant brought Smti Mohani Kumari from Delhi to Bhiwani and took

her to his quarter where the appellant was staying. She was kept in the quarter. He confined her in the quarter by locking the door from outside. It is stated that the appellant proposed himself for marriage to Smti Mohani Kumari but she did not accede to his proposal. The appellant committed rape upon her at night. She was kept there for five days.

5. Finding that Smti. Mohani Kumari disappeared from the house and was missing since 10.00 p. m. on October 13, 1967, Dial Chand lodged report Exhibit P. L. on October 18, 1967 at Cantonment Police Station, Ambala Cantt.

6. In pursuance of the report lodged by her father, Smti. Mohani Kumari was recovered by the Police from the quarter of the appellant on October 19, 1967. She produced her clothes. Memo pertaining to their recovery is Exhibit P. A.

7. Smti. Mohani Kumari was medically examined at 10.00 a. m. on October 21, 1967 by Dr. Shanti Sachdeva. She gave the opinion that the girl was not (sic) accustomed to sexual intercourse, that she had been subjected to sexual intercourse, that her hymen was not freshly torn, that there were no injuries on her private parts or any other part of the body and that her age was about 20 years.

8. Dr. K. C. Marwaha, Radiologist conducted X-ray examination of the girl on October 21, 1967. He found that the ends of bones of joints of the arms and the legs were fused and their epiphyses was complete. He however, found that epiphysis of iliac crest had not fused. He gave the opinion that the age of the girl was about 18 years but not more than 19 years.

9. In support of the age of the girl, Dial Chand father of Smti Mohani Kumari produced in course of investigation her school pass certificate, Exhibit P. B. In that certificate, date of her birth shown is April 6, 1950.

10. The appellant was proceeded against for trial under Section 366 Indian Penal Code. In support of the case of the prosecution, the evidence of Smti Mohani Kumari P. W. 3, Amar Dass P. W. 5, Dial Chand P. W. 6 and Smti Phulla Wati mother of Smti Mohani Kumari P. W. 7 was adduced to show that Smt Mohani Kumari had been kidnapped or abducted by the appellant.

11. In his statement under Sec. 342, Criminal P. C. the appellant admitted that he took the girl to Bhiwani with her consent, that he had kept her in his quarter and she was recovered from there.

12. The trial Court took the view that the girl had left the house of her own free will without any coercion or deception practiced upon her and was thus a willing party to the disappearance with the appellant from the lawful keeping of her parents. On the question of the age of the girl, the trial Court held that the

school certificate produced on behalf of the girl coupled with the testimony of Dial Chand, Smti. Phulla Wati and Smti. Mohani Kumari herself, her age was less than 18 years and as such the question of consent was inconsequential. In the result, he held the appellant guilty under Section 366, Indian Penal Code and convicted and sentenced as referred to above.

13. Shri Baldev Kapur appearing on behalf of the appellant has contended that in the face of finding to the effect that the girl willingly left the house with the appellant and never raised her little finger during the course of her journey from Ambala Cantt to Delhi and from Delhi to Bhiwani and of her own free will without any demur remained with the appellant at his quarter, the only question, which remains to be considered, is the age of the girl. He contended that the age of the girl is more than 18 years and in any case as the evidence is equivocal and not free from difficulty as to the girl being either less than 18 or more than 18, benefit of doubt should be given to the appellant.

14. The statement of Dial Chand P. W. father of the girl and her own statement, leave no doubt that Smti Mohani Kumari is a willing partner to her being taken away by the appellant and left her parents' house of her own free will to be in the company of the appellant. There is no doubt that, as she stated in Court, she felt at first hesitant to accede to the proposal of the appellant for accompanying him to Bhiwani but later on she toed the line of the desire of the appellant and agreed to go with him to Bhiwani. She left the house of her parents at 10 00 p m. on October 13, 1967 when the appellant was nowhere near her. She states that she got awakened on hearing the knock at the door of Krishan Lal her neighbour and that she left the house in order to see the drama, which was going on in Anaj Mandi. It is her case that while proceeding towards Anaj Mandi, she came across the appellant and after some hesitancy agreed to accompany the appellant. She is a grown up girl of about 18 years. She is stated to have studied up to Matric. She was not taken away under any intimidation or as a result of misrepresentation and against her own will. She could have raised hue and cry and invited the help of the passers-by when the appellant wanted to take her to the Railway Station at Ambala Cantt. She voluntarily accompanied him to the Railway Station. She never raised any alarm or protest against the appellant at the Railway Station by bringing the matter to the notice of railway authorities or railway police nor she sought the help of any passenger travelling in the compartment of the train in which the two sat together. She nowhere sought the help of anyone either at Delhi Railway Station or Delhi Bus Stand or at

Bhiwani Bus Stand against the act of abduction of the appellant, if it could be that act at all. In fact, she herself gave a slip to her parents and left the house without informing them. It appears, she had pre-planned with the appellant and left with him accordingly. She stayed for five days in the quarter of the appellant. He committed rape with her. She never raised any hue and cry nor solicited the assistance of the neighbours of the appellant. It appears that she was not only a willing party to accompany the appellant by leaving her parent's house but also she was living with him in his quarter like a house-wife. Thus, the finding arrived at by the trial Court as to her having not been removed by the appellant from the lawful guardianship of her parents and having gone herself with her free consent and in fact according to her own choice left her parents' house and accompanied the appellant and stayed with him at Bhiwani, is unimpeachable.

15. The only question, which remains to be considered is whether the date of birth of the girl as given in the school certificate, Exhibit P. B. should be treated as precise and correct or the age of the girl as given by Dr Shanti Sachdeva and Dr. K C Marwaha Radiologist should be taken to be the age of the girl. It is a matter of common knowledge that the ages given at the time of admission of girls and boys in schools are far from being precise. More often than not, attempt is made by the parents and guardians of their wards, who get admission in the schools, to understate their ages and to give a later date of birth than the real one. Thus, the ages given in the school certificates are not dependable for determination of the precise date of birth of a student, to whom the entry as to the date of birth in the school records pertains. According to Exhibit P. B., the date of birth of the girl is April 6, 1950. The girl disappeared from her house on October 13, 1967.

Thus, according to the date of birth given in that certificate, her age will be 17 years, 6 months and 7 days. Now, if there is error in giving reduced age by six months, the age of the girl could be 18 years. The entry in the school register was sought to be supported by the oral testimony of Dial Chand father of the girl and Smti Phulla Wati mother of the girl. They originally hail from West Pakistan. They stated that the girl was born about three years after their migration from Pakistan to India. They say that so far as they are able to remember, the girl was born in the month of Chait of Bikrami calendar and in the year of 1950 of Gregorian calendar. In other words, subject to the extent to which their memory could help them, they think she was born in 1950 some time at the end of March or beginning of April, 1950. If the age were

given in the entry incorporated in birth register kept either in the office of the Civil Surgeon or maintained in the office of a Municipal Committee prepared in course of official business, the approach to the correctness of the date of birth would have been different and faith could be had in the correctness of the entry made therein. In the present case, the entry pertaining to the age of the girl has not been proved from any birth register but from a school register and the oral evidence in support of the date of birth as given in the school certificate cannot be relied upon with implicit faith, especially when doubt has been cast upon the correctness of that age by the medical evidence adduced in the case. Dr. Shanti Sachdeva has stated that the girl is fully developed and her age could be 20 years. On the basis of X-ray examination and the test of epiphyses, namely, the extent of fusion of joint bones in the limbs, the Radiologist has stated that the age of the girl could be about 18 years but below 19 years. The test of the age on the basis of fusion is a scientific test. The Radiologist has given the opinion that medial and lateral epiphyses of humerus and head of radius had fused, epiphyses of lower ends of radius and ulna, epiphyses of lower end of femur and upper ends of tibia and fibula, epiphyses of tibia and fibula and epiphyses of head of humerus had fused with corresponding shafts. The complete fusion of the ends of these bones at the joint shows that the age of the girl was likely to be 18 and may be above it. The Radiologist has given the opinion that the age of the girl is about 18 and not above 19.

16. I feel inclined to accept the age of the girl given by the Radiologist to be 18 and not less than 18, as mentioned in the school certificate. Even on the basis of these two conflicting pieces of evidence, it could be held that the prosecution had not successfully established that the age of the girl was less than 18 and benefit of uncertainty as to the age of the girl being less than 18 should be given to the appellant.

For the forgoing reasons, I allow the appeal, set aside the conviction and acquit the appellant and acquit him. Appeal allowed.

1970 Cri. L. J. 1386, (Vol. 76, C. N. 367) =

AIR 1970 TRIPURA 72 (V 57 C 18)

R S BINDRA, J C

Nilamani Singh Tanu Singh, Petitioner v The State, Respondent

Criminal Revn No 15 of 1968, D/- 17-11-1969, from Order of S. J. Tripura, in Cri Motion No 294 of 1967

CN/EN/B505/70/MVJ/D

(A) Motor Vehicles Act (1939) (as amended by Amending Act of 1956). S. 130(1) — Summary disposal of cases — Word "shall" is mandatory — Infraction of provisions invalidates trial. AIR 1965 SC 1583, Applied. (Para 4)

(B) Motor Vehicles Act (1939), Section 130(1) — Summary disposal — Offence under S. 123 of Act — Issue of summons — Motor Vehicles Act being special law within S. 1(2) of Criminal P. C., provisions of S. 130(1) apply in trial of offence under the Act. (Paras 4, 5)

(C) Criminal P. C. (1898), S. 1(2) — Special law — Motor Vehicles Act (1939) is special law — Provisions of S. 130(1) of that Act apply in trial under S. 123 of that Act. (Paras 4, 5)

(D) Motor Vehicles Act (1939), S. 123 — Offence under — S. 130(1) applies and not Criminal P. C. (Paras 4, 5)

(E) Criminal P. C. (1898), S. 191 — Offence under S. 123 Motor Vehicles Act — Police detecting offence on road where magistrate was holding mobile Court and taking accused to magistrate — Magistrate not complying with provisions of Ss. 191 and 556 and convicting accused on his admission — Conviction held was illegal. (Para 7)

(F) Criminal P. C. (1898), S. 556 — Offence under S. 123 Motor Vehicles Act — Police detecting offence on road where magistrate was holding mobile Court and accused taken to him — Provisions of Ss. 191 and 556 not complied with — Conviction held was illegal. (Para 7)

(G) Constitution of India, Art. 22(1) — Conviction for offence under S. 123 of Motor Vehicles Act — Provisions of Sections 191 and 556 of Criminal P. C. not complied with — Accused held was deprived of his privileges under Art. 22(1). (Para 7)

(H) Motor Vehicles Act (1939), S. 123 — Offence under — Provisions of Ss. 191 and 556 Cri. P. C. not complied with — Accused deprived of his privilege under Art. 22(1) of the Constitution — Trial held vitiated. (Para 7)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1583 (V 52) =

1965 (2) Cri LJ 547, Puran Singh v State of Madhya Pradesh 4, 5

(1957) AIR 1957 SC 425 (V 44) =

1957 SCR 575, Manak Lal v. Dr. Prem Chand 6

(1954) AIR 1954 SC 322 (V 41) =

1954 Cri LJ 910, Shiv Bahadur v. State of Vindhya Pradesh 4

(1936) AIR 1936 PC 253 (2) (V 23) =

37 Cri LJ 897, Nazir Ahmed v King-Emperor 4

A. M. Lodh, for Petitioner, H C Nath, Govt Advocate, for Respondent

ORDER:— This revision petition by Nilmani Singh is directed against the

order, dated 13-12-1967, by which Shri P. Nath, the Sub-divisional Magistrate, Dharmanagar, convicted and sentenced him to a fine of Rs. 200/-, or, in default, 10 days' simple imprisonment, under Section 123 of the Motor Vehicles Act, hereinafter called 'the Act'. Nilmani Singh before filing the instant revision petition had moved the Sessions Judge, Tripura, praying that the conviction and sentence should be quashed because the trial held by Shri P. Nath stood vitiated for reasons which I shall outline presently. However, the Sessions Judge did not accept his contention as justified in law and so rejected his motion.

2. The case of the prosecution against Nilmani Singh was that while driving the loaded truck No. TRL 957 on Assam-Agartala road, on 13-12-1967, he happened to carry five passengers and had thereby committed an offence punishable under Section 123 read with Section 112 of the Act. The offence was detected by Shri Sailesh Kumar Bhattacharjee, the Assistant Sub-Inspector of Police, who was on checking duty on Assam-Agartala road when Nilmani Singh happened to drive the truck. Shri Bhattacharjee immediately prepared a report and presented the same along with the accused before Shri P. Nath, who, it is said, was then holding mobile Court on the road side. The accused, when examined under Section 342 of the Criminal Procedure Code, hereinafter called the Code, it is the contention of the prosecution, pleaded guilty to the charge and so he was convicted and sentenced in the manner mentioned above on that plea of guilty. He paid Rs. 20/- at the moment of his conviction and was then allowed time upto 31-12-1967 for paying the balance amount of the fine. The driving licence of Nilmani Singh was taken into possession pending payment of the balance amount.

3. The facts of the occurrence, according to the version of Nilmani Singh, are that while he was driving the truck he noticed Shri P. Nath, along with a police party, standing on the road, and that when the vehicle reached near them a police officer signalled that the vehicle be stopped and that signal was obeyed. A short while after, he (the petitioner) was prosecuted before Shri P. Nath, convicted, and sentenced at the spot. In support of these averments Nilmani Singh had filed an affidavit before the Sessions Judge and he placed reliance on that document during the course of arguments in this Court. It was specifically mentioned in this affidavit that Shri P. Nath along with a police party was seen by Nilmani Singh in front of his vehicle, that a police officer out of that police party stopped the vehicle, that just at that moment Shri P. Nath was with that police officer, and that right from the

moment of stoppage of the vehicle till the time of his conviction and payment of Rs. 20/- as part payment of the fine imposed on him the Magistrate and the police officials remained at the place side by side.

4. The main point urged in this Court by Shri A. M. Lodh for the petitioner was that the trial stands vitiated because of flagrant violation of the provisions of Section 130 of the Act. Sub-section (1) of that section, which alone requires to be interpreted in the present case, is in the following terms:—

"A Court taking cognizance of an offence under this Act 'shall', unless the offence is an offence specified in Part A of the Fifth Schedule, state upon the summons to be served on the accused person that he—

- (a) may appear by pleader and not in person, or
- (b) may by a specified date prior to the hearing of the charge plead guilty to the charge by registered letter and remit to the Court such sum, not exceeding twenty-five rupees as the Court may specify."

It may be appropriately mentioned that the underlined (here in ' ') word "shall" was substituted for the word "may", by S. 96 of the Motor Vehicles (Amendment) Act of 1956. The substitution has its obvious signification. It indicates clearly that whereas the provision was previously discretionary or directory, it became mandatory after the amendment.

The Supreme Court held in the case of *Puran Singh v. State of Madhya Pradesh*, AIR 1965 SC 1583, that there can be no doubt on the plain terms of Section 130(1) that the provision is mandatory. At another place in the same report, the Supreme Court observed that the Magistrate taking cognizance of an offence is bound to issue summons of the nature prescribed by sub-section (1) of Sec 130. In face of these authoritative pronouncements, which are binding on all Courts within the Territory of India in view of Article 141 of the Constitution, there is no scope for the contention that a Court taking cognizance of an offence of the nature mentioned in sub-section (1) of Section 130 of the Act has any option in the matter of issuing summons to the accused or summons of the nature stated therein. Sub-section (2) of Section 1 of the Code prescribes, inter alia, that in the absence of any specific provision to the contrary, nothing contained in the Code shall affect any special or local law in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. It cannot be gainsaid that issuing of process to the accused forms an essential part of the procedure for enquiry into or trial of the

offence charged and that the Motor Vehicles Act is a special law and it is still in force. Therefore, any infraction of the provisions of sub-section (1) of Sec 130 of the Act must invalidate the trial. It was held by the Privy Council in the case of *Nazir Ahmed v. King-Emperor* AIR 1936 PC 253 (2), that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. That view of the Privy Council was reaffirmed by the Supreme Court in the case of *Shiv Bahadur v. State of Vindhya Pradesh*, AIR 1951 SC 322. Therefore, there is no escape from the conclusion that the Sub-divisional Magistrate had no option but to try the petitioner after issuing a summons to him in terms of Section 130(1) of the Act, and that having not been done the trial held by him stands vitiated.

5. Non-compliance with the provisions of Section 130(1) seriously prejudices the accused in more than one way. Firstly if the Magistrate issues the summons of the nature mentioned in clause (a) of that provision the accused can enter appearance through a pleader and thereby avoid personal appearance in the Court, which is by no means a small concession in the present day world of busy life and constant work to earn one's bread and butter. If the summons is issued under clause (b) then the accused is given the facility of not appearing in Court personally or through pleader, if he decides to plead guilty, and in that event he is also given the concession of sentence of a fine not exceeding Rs 25/-, though the offence committed by him may be punishable by a more bigger fine or even by a term of imprisonment. Further, if the offence committed is one of those specified in Part B of the Fifth Schedule of the Act, and the accused pleads guilty to the charge and forwards the licence to the Court in terms of sub-section (3) of Section 130, no further proceedings in respect of the offence committed shall be taken against him, nor shall he be liable to be disqualified for holding or obtaining a licence by reason of his having pleaded guilty. All these concessions, it is evident, are of far-reaching consequences to the public owning and driving the vehicles.

Non-compliance by the Magistrate with the provisions of Section 130(1), it is obvious, would deprive the accused of all these statutory concessions of no inconsiderable value and so he can legitimately contend that a trial held in violation thereof should be quashed and his conviction and sentence set aside. Section 130 of the Act was enacted, the Supreme Court observed in the case of *Puran Singh*, AIR 1965 SC 1583 (supra), with a

view to protect from harassment a person guilty of a minor infraction of the Motor Vehicles Act or the Rules framed thereunder by dispensing with his presence before the Magistrate and in appropriate cases giving him an option to plead guilty to the charge and to remit the amount which can in no case exceed Rs. 25/-. The concessions given and the facilities provided to an accused charged with an offence under the Act cannot be permitted to be whittled down at the hands of a Magistrate taking cognizance of the offence on the specious plea that since the accused had put in appearance in the Court there was no necessity of issuing the summons. Therefore, I see no way out of the conclusion that the trial staged by Shri P. Nath was vitiated because of non-compliance with the provisions of Section 130(1) of the Act. The corollary that follows is that the conviction of the petitioner and the sentence imposed on him cannot be sustained.

6. The next point urged by Shri Lodh was that since the offence had been committed in the very presence of Shri P. Nath, it was obligatory on him in terms of Section 191 of the Code that he should inform the accused that the latter is entitled to have the case tried by another Court, and that this having not been done the trial held was vitiated. Section 191 provides that when a Magistrate takes cognizance of an offence under clause (c) of sub-section (1) of Sec 190 of the Code, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused objects to being tried by such Magistrate, the case shall be committed to the Court of Session or transferred to another Magistrate for trial. Clause (c) of Section 190(1) of the Code enacts that a District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed. We have the affidavit of the petitioner that when his vehicle was stopped by the police officer, Shri P. Nath was present on the road and that that police officer and the Magistrate remained together right from the moment of stopping the vehicle until the trial was concluded.

A reference to the file of the Sessions Judge would show that he called the report of Shri P. Nath respecting the grounds stated in the revision petition, that Shri P. Nath sent a reply to the Sessions Judge, and that all that he could state therein was that he had nothing else to add to what had been recorded in the order-sheet of the case file. Obviously, the Magistrate had not the courage

to deny that he and the police officer were standing side by side on the road when the latter stopped the vehicle driven by the petitioner. It is correct that the Magistrate took cognizance of the case not on the basis of his own knowledge but on the report submitted to him by the police officer only a few minutes after the offence was detected. However, to contend in such circumstances that the Magistrate had not taken cognizance upon his own knowledge or suspicion would be more apparent than real. Section 556 of the Code enacts that no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself. The illustration added to the section says that if A, as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws, A is disqualified from trying this case as a Magistrate.

The Supreme Court observed in the case of *Manak Lal v. Dr. Prem Chand*, AIR 1957 SC 425, that it is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially, and it is of the essence of judicial decisions and judicial administration that Judges should be able to act impartially, objectively and without any bias. In such cases, it was observed further, the test is not whether in fact a bias has affected the judgment but the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense, the Supreme Court pointed out, that it is often said that justice must not only be done but must also appear to be done.

7. In the background of the statutory provisions and the principles set out above, I feel convinced that Shri P. Nath should not have tried the case against the petitioner. If when the vehicle was stopped by the police officer the Magistrate was standing along with the latter, and if only some minutes thereafter the accused was tried on the charge detected, and if he was taken before the Magistrate by the police officer who detected the crime for the purposes of that trial, the accused could not but labour under the impression that the Magistrate was well aware of the particulars of the offence charged and that the only safe course open to him was to plead guilty and thereby avoid harassment. The accused was therefore clearly deprived of adequate and reasonable opportunity of pre-

paring his defence, and he was also deprived of the privilege of being defended by a legal practitioner, a privilege vouchered to the citizen by Article 22(1) of the Constitution. The petitioner has alleged in para 11 of the grounds adopted in the revision petition that he had not been even furnished with a copy of the police report, submitted to the Court before his trial. Hence, the trial of the accused cannot be said to have been either fair to him or to have been held in the proper judicial atmosphere and those features of the trial coupled with non-compliance with the provisions of Sections 191 and 556 of the Code inevitably lead to the conclusion that the trial stands vitiated. I hold accordingly.

8. As a result, I allow the petition and on setting aside the conviction and sentence of Nilmani Singh I direct that he be re-tried on the offence charged. The fine, if paid, shall be refunded to him.

Re-trial ordered.

1970 CRI. L. J. 1389 (Vol. 76, C. N. 368) =
AIR 1970 SUPREME COURT 1492 (V 57 C 313)

(From Patna)

A. N. RAY AND I. D. DUA, JJ.

Sheo Mahadeo Singh, Appellant v.
The State of Bihar, Respondent

Criminal Appeal No. 88 of 1967, D/-
6-3-1970.

Penal Code (1860), S. 149 — Every member of unlawful assembly guilty of offence committed in prosecution of common object — Section creates specific offence — Common object and not common intention essential — Evidence showing that common object of all members of assembly was that murder was likely to be committed in prosecution of common object, namely, to commit murder, assault, mischief and criminal trespass — All accused held guilty under S. 302 read with S. 149. (Paras 8, 9, 10)

The following judgment of the Court was delivered by

RAY, J.: This is an appeal by special leave against the judgment of the High Court at Patna dated 28 February, 1967 allowing the appeal in part by acquitting Ram Rattan Singh, Sheo Pujan Singh and Ram Nagina Singh and acquitting the remaining accused of the charge under section 447 of the Indian Penal Code and dismissing the appeal by upholding the conviction of those remaining accused under sec-

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tions 302/149 of the Indian Penal Code and of the appellant and accused Manogi Singh under section 324 of the Indian Penal Code and altering the sentence of death imposed on Rajballam into one of rigorous imprisonment for life.

2. The appellant and seven others are all Gwalas by caste and residents of village Rayapur situated at a distance of 5 miles from Maner Police-station in the District of Patna where the occurrence took place. The 8 accused belonged to three different families. The accused Sheo Pujan Singh and Rajballam are sons of the accused Manogi Singh. The appellant Sheo Mahadeo Singh and accused Ram Nagina are the sons of accused Ram Charan. The accused Ram Rattan is the son of accused Ram Lakhan.

3. The prosecution case in short is that at about 7 A. M. on 23 October, 1965 the accused Rajballam and seven others including the appellant attacked Ram Prasad and other members of the prosecution party. Sarjug and Suraj Mahto the two brothers were sitting near their tubewell towards the south of the village Bayapur when accused Ram Lakhan armed with garasa and the other accused armed with bhalas came suddenly in a mob and began to demolish the stairs attached to the tubewell. On protest by these two brothers under orders of assault given by the accused Ram Charan, the accused Manogi and the appellant gave bhala blows on the person of Sarjug Prasad. On alarm raised by Sarjug and Suraj Mahto, then other brothers Lakshman and Ram Prasad, the deceased, arrived there and protested against the action of the accused. Then the accused Rajballam gave a bhala blow at the throat of Ram Prasad who died at the spot. Ram Lakhan gave garasa blow on the head of Bharat. The remaining accused are also alleged to have continued wielding their bhalas and Ramcharan's bhala struck the right hand of Bharat. Several persons of the village came as a result of hue and cry. The accused fled away.

4. The motive for the occurrence alleged by the prosecution was that the accused were envious of Sarjug Prasad and others of his family having constructed tube-well 5-6 months before the occurrence and at the time of the occurrence the accused came

armed with the object of forcibly removing the tube-well and on protest being made against their action, they committed the assault and the murder.

5. The accused pleaded innocence. Some of them pleaded alibi as well. The plea of alibi was rejected by the trial Court and was not pressed in the High Court. The defence was that there was some quarrel on the date of occurrence much before 7 A. M. between accused Manogi on one side and Sarjug and others of family on the other and further that the brothers of the deceased Ram Prasad assaulted accused Manogi. It was further alleged that the villagers could not tolerate the high handed act of Ram Prasad and his brothers in assaulting Manogi; they came to the Gairmazarua land where the accused Manogi was assaulted by Ram Prasad and there was a free fight between the villagers on one side and Ram Prasad and other members of the family on the other in which Ram Prasad was killed.

6. The High Court rejected the defence version. On a review of the entire evidence the High Court came to the conclusion that there was sufficient evidence to prove that Rajballam was responsible for the murder of Ram Prasad. The High Court further held that the charge under section 324 against the three accused and the appellant and the charge under S 426 against all the accused other than Ram Rattan, Ram Nagina and Sheo Pujan and the charge under sections 302/149 of the Indian Penal Code against all the persons other than Ram Rattan, Ram Nagina and Sheo Pujan were proved.

7. At the hearing of this appeal the only contention which was advanced was that the death caused by Rajballam was an individual act and the appellant could not be convicted of the charge of the common object to commit murder, assaults, mischief and criminal trespass.

8. The essence of section 149 of the Indian Penal Code is that an accused person whose case falls within the terms of the section cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly. It is an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly.

and it is an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

9. Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of five or more persons having a common object and the doing of acts by members is in prosecution of that object. The emphasis is on common object. There is no question of common intention in section 149. The act must be one which upon the evidence appears to have been done with a view to accomplishing the common object attributed to the members of the unlawful assembly. Thus every person who is engaged in prosecuting the same object, although he had no intention to commit the offence, will be guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting in the circumstances mentioned in the section. It is in this sense that common object is to be understood.

10. In the present case the facts and the circumstances show that the assault and the demolition of the stairs of the well took place in the same transaction because the members of the unlawful assembly attacked Ram Prasad and his people and injured some of them simultaneously or in quick succession. Sarjug Mahto and Suraj Mahto both said that at the instigation of accused Ram Charan accused Manogi gave a bhala blow near the left elbow of Sarjug Mahto. Sarjug also said that accused Sheo Pujan gave him a bhala blow below the elbow of the left hand and the appellant gave him a bhala blow on the finger of right hand. According to Suraj Mahto the appellant struck Sarjug Mahto on the finger of his right hand. Suraj and Sarjug then raised an alarm. On hearing the alarm Ram Prasad, Bharat and Lakhan came. Ram Prasad protested to the accused against the attack on Sarjug Mahto. At the instigation of accused Ram Charan accused Rajballam struck Ram Prasad with a bhala. Ram Prasad fell down and died there. Ram Lakhan then struck Bharat with a garasa. Ram Charan struck him on the head with a bhala. The assailants then fled away. The evidence proves that the common object of all the members of the assembly was that murder was likely to be committed in prosecution

of a common object, namely, to commit murder, assault, mischief and criminal trespass. All the members of the assembly were armed with weapons, they knew that murder was to be committed in prosecution of that object. It cannot, therefore, be said that the appellant is not guilty of the charge under sections 302/149 of the Indian Penal Code.

11. In the result, the appeal fails and is dismissed.

Appeal dismissed

1970 CRI. L. J. 1391 (Vol. 76, C. N. 369) =
AIR 1970 SUPREME COURT 1514 (V 57 C 317)

(From: Bombay)

A. N. RAY AND I. D. DUA JJ.

Hargun Sunder Das Godeja and others, Appellants v. The State of Maharashtra, Respondents.

Criminal Appeals Nos. 153, 155 and 172 of 1967 D/- 26-3-1970.

(A) Evidence Act (1872), S. 101 — Burden of proof — Criminal trial — Charge of criminal misappropriation under Prevention of Corruption Act — Nature of burden of proof on prosecution, negative — Burden can be discharged by circumstantial evidence — Duty of court under S. 342 A, Cr. P. C. pointed out.

Where the accused were charged with criminal conspiracy to commit criminal misappropriation on allegation that they had dishonestly and fraudulently misappropriated or converted to their own use some bags of wheat from the bags released from the ship, it is no doubt true that the onus on the prosecution is of a negative character and also that the failure on the part of the accused to give evidence on the question as to when, where and to whom the controversial bags were delivered cannot under our law give rise to any presumption against them. The criminal courts holding trial under the Criminal P. C. have to bear in mind the provisions of S. 342-A of the Code and to see that their mind is not influenced by such failure on the part of the accused. But that does not mean that such negative onus is not capable of being discharged by appropriate circumstantial evidence. If the circumstantial evidence is trustworthy and establishes facts and circumstances the

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combination of which, does not admit of any safe inference other than that of the guilt of the accused then there can hardly be any escape for him and the Court can confidently record a verdict of guilty beyond reasonable doubt. The Court would, of course, be well advised in case of circumstantial evidence to be watchful and to ensure that conjectures or suspicions do not take the place of legal proof. The chain of evidence to sustain a conviction must be complete and admit of no reasonable conclusion consistent with the innocence of the accused. (Paras 1, 6)

(B) Constitution of India, Art. 136 — Supreme Court when will review evidence.

The Supreme Court under Art. 136 does not normally proceed to review the evidence in criminal cases unless the trial is vitiated by some illegality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This Article reserves to the Supreme Court a special discretionary power to interfere in suitable cases when for special reasons it considers that interference is called for in the larger interests of justice. This article cannot be so construed as to confer on a party a right of appeal where none exists under the law. Cr. A. No. 125 of 1967 D/- 12-1-1968 (SC) Ref. (Para 3)

(C) Criminal P. C. (1898), S. 312-A — Duty of Court in the matter of appreciating evidence pointed out.

(Para 6)

(D) Prevention of Corruption Act (1947), S. 5—Misappropriation—Negative burden on prosecution can be discharged by circumstantial evidence.

(Para 6)

Cases Ref: Chronological Paras
(1968) Cri. Appeal No 125 of 1967

D/- 12-1-1968 (SC), Chidha

Singh v. State of Madh Pra

9

Following judgment of the Court was delivered by

DUA, J.: The four appellants in these three appeals by special leave were tried in the Court of the Special Judge for Greater Bombay on a charge of conspiracy punishable under S 120-B, I P. C. Accused No 1 (Shiv Kumar Lokumal Bhatia) was a godown clerk, accused No 2 (Hargun Sunderdas Godeja) was the Senior,

Godown Keeper and accused no. 3 (Hundraj Harchomal Mangtani) was the Godown Superintendent at the General Motors Godown at T-Shed, Sewri, Bombay, belonging to the Food Dept. of the Government of India. Accused No. 4 (Shankar Maruthi Phadtare) was a driver of Truck No. 2411. The allegation against them was that all these accused during the month of July, 1963 were parties to criminal conspiracy to commit criminal breach of trust in respect of 1060 bags of red wheat which were released from the ship S. S. Hudson on July 7, 1963 at Bombay for storing them in the G-M. 2 Godown at Sewri. In pursuance of this conspiracy, it was alleged, they had dishonestly and fraudulently misappropriated or converted to their own use 80 bags of red wheat out of 1060 bags released from the ship. Accused Nos. 1, 2 and 3 were also charged under Section 409 read with Section 34, I. P. C., Section 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act, 1947 read with Section 34, I. P. C., Section 5 (2) read with Section 5 (1) (c) of the Prevention of Corruption Act read with Section 34, I. P. C. and Section 477-A read with Section 34, I. P. C.

2. The learned Special Judge on a consideration of the evidence on the record held that the prosecution has succeeded in proving the conspiracy on the part of all the four accused to commit criminal breach of trust in respect of the 80 bags of red wheat. Accused Nos 1, 2 and 3 were also held to have gained pecuniary advantage and further to have altered the records of the T Shed. Holding the offences to be serious in view of the general shortage of food grains in the country the court felt that the case called for deterrent sentences. Under S 120-B I P C all the accused were sentenced to rigorous imprisonment for four years. Accused Nos 1, 2 and 3 were in addition held guilty under S. 409, I P C read with S 34, I P C and under S. 5 (2) read with S 5 (1) (c) of the Prevention of Corruption Act read with S 34, I P C, under Section 5(2) read with S 5(1)(d) of Prevention of Corruption Act read with S 34, I P C. and also under S. 477-A read with S. 34, I P C and sentenced to rigorous imprisonment for four years on each of these four counts, the sentences to be concurrent.

3. On appeal the High Court confirmed the order of the trial court as against accused No. 4 and dismissed his appeal. The conviction of accused No. 1 under S. 5(2) read with S. 5(1)(c) of the Prevention of Corruption Act read with S. 34, I. P. C. was set aside. But his conviction and sentence under S. 120-B, I. P. C. and under S. 5(2) read with S. 5(1)(d) of the Prevention of Corruption Act read with S. 34, I. P. C. as also under S. 477-A read with S. 34, I. P. C. was confirmed. His conviction under S. 409 read with S. 34, I. P. C. was altered to one under S. 409, I. P. C. but without altering the sentence. The convictions of accused Nos. 2 and 3 under S. 409, I. P. C. read with S. 34, I. P. C. as also under S. 5(2) read with S. 5(1)(c) of the Prevention of Corruption Act read with S. 34, I. P. C. were set aside but their conviction and sentence under S. 120-B, I. P. C. and under S. 5(2) read with S. 5(1)(d) of the Prevention of Corruption Act read with S. 34, I. P. C. was confirmed.

4. In this Court Shri Chari questioned the appellants' conviction on the broad argument which was indeed the main plank of his challenge against the impugned order that there was a great confusion in the matter of storage of stocks of the foodgrains in the T-Shed and there was complete want of regularity and considerable inefficiency in the matter of keeping the records of the arrivals and storage of the stocks with the result that it would be highly unsafe to rely on the evidence relating to the records of the stocks in the T-Shed, for holding the appellants guilty of the criminal offences charged. The learned counsel appearing on behalf of the other appellants, while generally adopting Shri Chari's arguments, supplemented them by reference to the distinguishing features of the case against their individual clients.

5. The counsel in the course of their arguments emphasised that the prosecution, in order to prove the negative has the difficult task of affirmatively establishing by unimpeachable evidence that 80 bags which were the subject matter of the charge were in fact not received in the T-Shed. The prosecution must, said the counsel, bring the charge home to every accused person beyond reasonable doubt.

6. The submission as developed by all the counsel representing the appellants did seem on first impression to

be attractive but on a deeper probe we consider it to be unacceptable. It is no doubt true that the onus on the prosecution is of a negative character and also that the failure on the part of the accused to give evidence on the question as to when, where and to whom the controversial 80 bags were delivered at the point of unloading — a fact on which the driver of the truck and those whose duty it was to receive the goods at the T-Shed could give the best and the most direct information — cannot under our law give rise to any presumption against them. The criminal courts holding trial under the Code of Criminal Procedure have accordingly to bear in mind the provisions of S. 342-A of the Code and to take anxious care that in appreciating the evidence on the record and the circumstances of the case, their mind is not influenced by such failure on the part of the accused. But that does not mean that such negative onus is not capable of being discharged by appropriate circumstantial evidence. If the circumstantial evidence which is trustworthy and which with unerring certainty establishes facts and circumstances the combination of which, on reasonable hypothesis, does not admit of any safe inference other than that of the guilt of the accused then there can hardly be any escape for him and the Court can confidently record a verdict of guilty beyond reasonable doubt. The court would, of course, be well-advised in case of circumstantial evidence to be watchful and to ensure that conjectures or suspicions do not take the place of legal proof. The chain of evidence to sustain a conviction must be complete and admit of no reasonable conclusion consistent with the innocence of the accused. In the present case it is fully proved and is indeed not disputed on behalf of the accused that truck No. 2411 with the 80 bags of red wheat did leave the dock and did pass the yellow gate which is the check point where a register is kept by the Regional Director of Food. In this Register entries are made when a truck leaves the yellow gate. The truck in question left the yellow gate at 11-20 a.m., on the second trip as deposed by Parmar, (P. W. 8). And this is not disputed. According to the accused the 80 bags in question were actually delivered at the appropriate place at the T-Shed and the truck chits duly given to the

truck driver in token of their receipt and indeed D. W. 1 was produced by accused No. 4 to prove the actual delivery. The prosecution case, on the other hand, is that those bags were not delivered at the T-Shed but were misappropriated. There is no dispute about the procedure of delivery at the T-Shed of the goods brought from the dock. This procedure in regard to the wheat brought on February 7, 1963 may briefly be stated.

7. The foodgrains consisting of 1060 bags of red wheat had arrived by S S Hudson at the Alexandra Docks. The trucks were loaded with the wheat bags to be taken to the T-Shed, Sewri. Four truck-chits were prepared at the docks for each truck out of which two were given to the truck driver concerned. The driver had to give the truck chits at the godown at the time of the delivery of the bags. One such chit would be returned to him after endorsing acknowledgment of the receipt of the bags, the other chit being retained at the godown. The one given to the driver was meant to authorise the receipt of hire charges from the food department. At the godown, according to the general procedure, the driver of the trucks had to give the truck chits to one of the godown clerks there. A batch of gangmen under a particular Mukaddam had generally to unload the goods from the trucks allotted to him and no Mukaddam with his gangmen could unload the goods from the trucks which was not allotted to him for the purpose. The gangmen had, therefore, to unload the goods as instructed by the clerk and the senior godown keeper. After unloading the bags cooly voucher was to be prepared and the daily diary maintained at the godown written: the kutchra chit was prepared by the godown keeper after the unloading and weighing of the goods. Only 10 per cent of the bags were as a matter of practice to be actually weighed.

8. The truck movement chart Ex 10 shows the order in which the various trucks left the dock for the T-Shed on July 7, 1963 as also their contents and the truck chit numbers. Truck No 2411 with 80 bags of red wheat figures twice in this document but it is not disputed that the trip which concerns us is entered at Sl No. 9. Truck chit number of this trip is 69 and the truck left the dock at 11.15 hours. The

truck at serial No. 3 (immediately preceding the trip in question) in this document is No. 2248 with 80 bags and its chit No. is 68. This truck left the dock at 11 a. m. The truck at Sl No. 10 (immediately next after the one in dispute) is 1477 with 65 bags of red wheat whose truck chit No. is 72. This truck left the dock at 11.45 hrs. There were in all 14 trips on July 7, and indeed, this is also established by oral evidence and is not denied on behalf of the accused. We may now turn to the tally sheet for July 7, 1963 Ex. 41. The first thing to be noticed in this document is that it only shows the arrival of 13 trucks. In other words according to this document there were only 13 trips of the trucks though the Truck Movement Order Ex. 10 clearly shows that there were 14 trips and on behalf of the accused also it was asserted that there were 14 trips. We find in Ex. 41 that after Sl. No. 3 which relates to truck No 2488 with its chit No. 68 and which arrived at the T-Shed at 11.58 a. m. there is recorded at serial No 9 the arrival of truck No. 7866 with chit No. 70 and at Sl No 10 the arrival of truck No 1477 with chit No 72 and at Sl No. 11 the arrival of truck No. 8769 with chit No 71. These three trucks are shown to have arrived at the unloading point at 11.45 p. m. It was explained at the bar that from 12 noon to 1 p. m. no work was done, it being lunch interval. It has been so stated by P. S. Shinde, Assistant Director, Vigilance Branch, as P. W. 18. Items at Sl Nos. 12 and 13 relate to trucks Nos 2752 and 1289 with their respective chit Nos 73 and 74. It is thus clear that chit No. 69 is missing in this sheet. Bapu T. Pingle produced as D. W. 1 claims to have been in truck No 2411 as a warner with the driver, accused No 4, on July 7, 1963. According to him this truck made two trips on that day between the dock and the T-Shed and on the second trip the other warner by name Yashwant had taken the truck chit from the clerk concerned after the same was duly signed. This witness has deposed about the procedure at the godown which is the same as was suggested on behalf of the prosecution. The man at the godown used to direct the drivers to the place of unloading the goods and, to quote his own words, "unless an entry was made in this Book (Tally Book) we were not allowed to go ahead

at all." So, according to his evidence, unless an entry was made in the Tally Book the truck could not proceed to the unloading point to deliver the goods brought from the dock. Exhibits 10 and 41 in our view affirmatively prove that 80 bags of red wheat carried by truck No. 2411 on July 7, 1963 on the second trip did not reach the T-Shed at all. This finds support even from the testimony of D. W. 1. In view of this documentary evidence with which no fault has been found the evidence regarding irregularities in the record of stock at the T-Shed loses all importance. It may be pointed out that, July 7, 1963 was a Sunday and as deposed by Parmeshwar D. Menon (P. W. 1) on that day all gates were not opened. But this is not all. Though in the tally chits time of the arrival of the truck at the unloading point is given in the truck chit in question that time is not shown. According to the evidence of Roque (P. W. 6) on the reverse of all truck chits Exts 15 to 26 and Exts. 11-A and 11-B entries are made in the handwriting of accused No. 1. In Exhibits 15 to 26 in addition to the arrival and departure of the trucks, progressive total at the back of each of them is also stated, but in Ex. 11-B there is no progressive total and in Ex. 11-A there is no signature of accused No. 1 though the progressive total is mentioned as 240. Exhibit 11-B, it may be pointed out, appertains to the trip by truck No 2411 on July 7, 1963

9. Shri Shinde, (P W. 18) who was Assistant Director, Vigilance Branch at the relevant time has deposed that according to the weighment register Ex 69 only 98 bags of S. S. Hudson were weighed and this was 10 per cent of 980 bags. This document bears the signatures of accused No. 1. Exhibit 41, carbon copy of the Arrival Tally sheet which was sent to the head office for showing if there was any detention of trucks in the godown does not as already noticed contain any entry in respect of the truck in question. The reverse of Ex. 41 is not printed in the printed paper book but we have checked up from the original record that the witness Shinde is right. Non-inclusion of the entry of the truck in question in Ex 41, is in our view, very material. In Ex 53 the daily Arrival Tally book for July 7, 1963 the entry at Sl No 68 shows departure of the truck, in ques-

tion at 12.15 afternoon whereas in Ex 41 it is shown as at 1.15 p. m. and in Ex. 11-B at 12.15 afternoon. This, according to P. W. 18, was designed to show that the truck was unloaded during the recess period which, according to evidence on the record, was not done. The explanation of accused No 1 is that on July 7, 1963 he was not feeling well though he attended the office. He had to get chits from the warners and count the number of bags in the truck and order the labourers to unload them from the trucks. The suggestion appears to be that due to these multifarious duties and due to his being unwell he had perforce to enter the truck chits in the tally books only when he could get time and meanwhile he had no other alternative but to put the unentered truck chits in his pocket. According to him, it was on July 10, 1963 when he was giving his clothes to the washerman that he discovered the solitary chit in question left by mistake in his pocket. The explanation is far from satisfactory and we are not impressed by it. It may in this connection be pointed out that July 7, 1963 was a Sunday and the three accused persons were specially called for receiving the grain that had arrived by the two steamers. The amount of work to be done on that day can thus scarcely be considered to be excessive. And then the fact that only one solitary truck chit relating to the 80 bags in question should happen to have remained in the pocket of accused No 1 to be discovered only on July 10, 1963 is also not without some significance. We agree with the High Court in holding this explanation to be unconvincing and that the 80 bags in question were in fact not received at the T-Shed on July 7, 1963. In our opinion, the material on the record to which our attention has been invited fully supports the conclusions of the High Court. We may appropriately repeat what has often been pointed out by this Court that under Article 136 of the Constitution this Court does not normally proceed to review the evidence in criminal cases unless the trial is vitiated by some illegality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This Article reserves to this Court a

special discretionary power to interfere in suitable cases when for special reasons it considers that interference is called for in the larger interests of justice. As observed by this Court in *Chidda Singh v. State of Madhya Pradesh*, Cri A. No 125 of 1967 D/- 12-1-1968 (SC) this Article cannot be so construed as to confer on a party a right of appeal where none exists under the law. We, however, undertook in this case to go through the evidence to which our attention was invited to see whether or not the conclusions of the High Court are insupportable. We are not persuaded to hold that in this case there is any cogent ground for interference with those conclusions. This appeal accordingly fails and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 1396 (Vol. 76, C. N. 370) —
AIR 1970 SUPREME COURT 1036 (V 37 C 347)
(From Patna)*

J C SHAH AND V. RAMASWAMI JJ.
Nani Gopal Mitra, Appellant v. State
of Bihar, Respondent.

Criminal Appeal No. 181 of 1965,
D/-15-10-1968.

(A) Prevention of Corruption Act (1947), S. 5 (3) — Appeal against conviction under S. 5 (2) — Pending appeal sub-section (3) repealed — Appellate Court can invoke presumption under S. 5 (3).

It is true that as a general rule alterations in the form of procedure are retrospective in character unless there is some good reason or other why they should not be. (1878) 3 AC 582 and (1905) 2 KB 335, Rel. on

(Para 5)

But there is another equally important principle, viz., that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force. Same principle is embodied in Sec. 6 of General Clauses Act. The effect of the application of this principle is that pending cases, although instituted under the old Act but still pending, are governed by the new procedure

*(Criminal Appeal No 268 of 1962, D/-14-9-1965—Pat)

DN/DN/F475/68/RGD/M .

under the amended law, but whatever procedure was correctly adopted and concluded under the old law cannot be opened again for the purpose of applying the new procedure 1936 Ch 237 and (1960) AC 965, Rel. on.

(Para 6)

Thus, even though pending appeal against conviction under S. 5 (2) of Prevention of Corruption Act, S. 5 (3) was repealed by Anti-Corruption Laws (Amendment) Act, 40 of 1964, it is open to the High Court to invoke the presumption contained in S. 5 (3) in considering the case of the appellant since the conviction of the appellant was pronounced by trial Judge long before the amendment.

(Para 6)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Retrospective operation — Procedural matter amended during pendency of appeal — Procedural amendment operates retrospectively but in cases instituted under old procedure and still pending when amendment came into force, old procedure applies.

(Para 6)

(C) General Clauses Act (1897), S. 6 — Change in procedural law during pendency of cases instituted under old procedural law — Old procedure applies — S. 6 embodies this principle.

(Para 5)

(D) Prevention of Corruption Act (1947), S. 5 (2) — Charge under, not disclosing amounts taken as bribes and persons from whom the accused had taken such bribes — This does not invalidate the charge though it may be a ground for asking for better particulars — Charge, however, should have contained better particulars to enable accused to prove his case.

(Para 9)

(E) Criminal P. C. (1898), S. 222 — Charge under S. 5 (2), Prevention of Corruption Act, should contain particulars of amounts taken as bribes and persons from whom they were taken — Absence of these particulars does not, however, invalidate charge but entitles accused to ask for better particulars.

(Para 9)

Cases Referred: Chronological Paras

(1960) 1960 AC 965 = 1960-3	
WLR 466, In re Vernazza	5
(1936) 1936 Ch 237 = 52 TLR	
70, In re a Debtor	5
(1905) 1905-2 KB 335 = 74 LJKB	
450, King v. Chandra Dharma	5
(1899) 1899 P 236 = 68 LJP	
101, The Ydun	5

(1878) 3 AC 582, James Gardner
v. Edward A. Lucas 5-

Mr. S. C. Agarwala, Advocate of M/s Ramamurthi and Co., for Appellant,
Mr. D. Goburdhun, Advocate, for Respondent.

The following Judgment of the Court was delivered by:

RAMASWAMI, J.—This appeal is brought, by special leave, from the judgment of the Patna High Court dated September 14, 1965 in Criminal Appeal No. 268 of 1962 filed by the appellant against the judgment of the Special Judge, Santhal Parganas, Dumka, dated March 31, 1962.

2. In January, 1958 the appellant was employed as a Railway Guard on the Eastern Railway and was posted at Shibganj Railway Station. On January 18, 1958, Hinga Lal Sinha (P.W. 47) who was in charge of squad of travelling ticket examiners caught hold of Shambu Pada Banerji (P.W. 54) as he found him working as a bogus travelling ticket examiner in a train. P.W. 47 handed Shambu Pada Banerji to Md. Junaid (P.W. 48) who was a police officer in charge of Barharwa Railway out-post. A Fard Beyan was recorded on the statement of P.W. 47 and G.R.P. Case No. 12(1)58 was registered against Shambu Pada Banerji. In connection with the investigation of that case the house of the appellant which was at a distance of 300 yards from Sahebganj Railway station was searched on January 19, 1958 at about 3 p.m. by P.W. 56 along with other police officers, Md. Junaid (P.W. 48) and Dharmadeo Singh (P.W. 57). Various articles were recovered from the house of the appellant and a search list (Ex. 5/17) was prepared. A charge-sheet was submitted in G.R.P. Case No. 12(1)58 against the appellant and Shambu Pada Banerji. Both of them were tried and convicted by the Assistant Sessions Judge, Dumka, by a judgment dated June 12, 1961. The appellant filed Criminal Appeal No. 405 of 1961 against his conviction under S. 474/466 of the Indian Penal Code. The appeal was allowed by the High Court by its judgment dated September 14, 1962, on the ground that there was no proof that the appellant was in conscious possession of the incriminating articles.

3. During the course of the investigation of G. R. P. Case No. 12(1)58,

the investigating officer (P.W. 56) found a sum of Rs. 51,000 standing to the credit of the appellant in the Eastern Railway Employees' Co-operative Credit Society Ltd., Calcutta. He also found the appellant in possession of National Savings Certificates of the value of Rs. 8,000. On August 24, 1958, the Investigating Officer (P.W. 56) handed over charge of the investigation of G.R.P. Case No. 12(1)58 to P.W. 46 of Sahebganj Government Railway Police Station. P.W. 46 completed the investigation on February 26, 1958. Since by that time it was found that the appellant was in possession of pecuniary resources disproportionate to his known sources of income it was thought that he had come in possession of these pecuniary resources by committing acts of misconduct as defined in clauses (a) to (d) of subsection (1) of S. 5 of the Prevention of Corruption Act, 1947 (Act 2 of 1947), hereinafter referred to as the 'Act', and since the investigation of a case under the Act could be carried only in accordance with the provisions of S. 5A of the Act, under the orders of the superior officers, the case being G.R.P. Case No. 12(1)58 was split up in the sense that a new case against the appellant being Sahebganj Police Station Case No. 11(2)59 was started upon the first information report of P.W. 46 made on February 26, 1959 to Gokhul Jha (P.W. 45), Officer in charge of Sahebganj Police Station. By his order dated February 27, 1959, Sri R. P. Lakhaiyar, Magistrate, First Class, Sahebganj, accepted the recommendation of the Deputy Superintendent of Police that Inspector Madhusudan Haldhar, P.W. 55, may investigate the case. Accordingly, Madhusudan Haldhar, P.W. 55, proceeded to investigate the case and after obtaining the sanction of the appropriate authority for prosecution of the appellant submitted a charge-sheet on March 31, 1960. Cognizance was taken and the case was transferred to Sri Banerji, a Magistrate, First Class, who committed the appellant and the two co-accused Baldeo Prasad and Mrs. Kamla Mitra to stand trial before the Court of Session. By his judgment dated March 31, 1962, the Special Judge, Santhal Parganas, convicted the appellant under S. 5 (2) of the Act and S. 411, Indian Penal Code. The appellant and the other co-accused Bal-

deo Prasad and Mrs. Kamla Mitra were acquitted of the charge of conspiracy under S. 120-B read with Sections 379, 411, 406 and 420, Indian Penal Code and S. 5(2) of the Act. The Special Judge also acquitted the appellant of the charge under S 474/466, Indian Penal Code. The matter was taken in appeal to the High Court which by its judgment dated September 14, 1965, set aside the conviction and sentence of the appellant under S. 411, Indian Penal Code and confirmed the conviction of the appellant under S 5 (2) of the Act. The High Court, however, reduced the sentence of 6 years' simple imprisonment and fine of Rs. 40,000 to 2 years' imprisonment and a fine of Rs 20,000.

4. Section 5 of the Act, as it stood before its amendment by Act 40 of 1964, read as follows:—

"5. (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in Section 161 of the Indian Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

(2) Any public servant who commits criminal misconduct in the discharge

of his duty shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

x x x x

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption

(4) The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him

On December 18, 1964, Parliament enacted the Anti-Corruption Laws (Amendment) Act, 1964 (Act No 40 of 1964) which repealed sub-section (3) of S 5 of the Act and enlarged the scope of criminal misconduct in S. 5 of the Act by inserting a new clause (e) in S. 5 (1) of the Act to the following effect:

"(e) if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income"

5. It was in the first place contended on behalf of the appellant that Section 5(3) of the Act was repealed by Parliament while the appeal was pending in the High Court and the presumption enacted in Section 5(3) of the Act was not available to the prosecuting authorities after the repeal of the sub-section on Dec 18, 1964. The argument was stressed that it was not open to the High Court to invoke the presumption contained in S. 5 (3) of

the Act in considering the case against the appellant. It was also said that the presumption contained in S 5 (3) of the Act was a rule of procedural law and not a rule of substantive law and alterations in the form of procedure are always retrospective in character unless there is some good reason or other why they should not be. It was, therefore, submitted that the judgment of the High Court was defective in law as it applied to the present case the presumption contained in Section 5 (3) of the Act even after its repeal. We are unable to accept the contention put forward on behalf of the appellant as correct. It is true that as a general rule alterations in the form of procedure are retrospective in character unless there is some good reason or other why they should not be. In *James Gardner v Edward A Lucas*, (1878) 3 AC 582 at p. 603, Lord Blackburn stated:

"Now the general rule, not merely of England and Scotland, but, I believe, of every civilized nation, is expressed in the maxim, '*Nova constitutio futuris formam imponere debet, non prae-teritis*'—prima facie, any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to show it, it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal."

In the *King v. Chandra Dharma*, (1905) 2-KB 335, Lord Alverstone, C J., observed as follows:

"The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shorten-

ing the time within which proceedings can be taken is retrospective (*The Ydun*, 1899 P 236), and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr. Compton Smith would have been entitled to succeed, but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here."

It is therefore clear that as a general rule the amended law relating to procedure operates retrospectively. But there is another equally important principle, viz., that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force (See *In re a Debtor*, 1936 Ch 237 and *In re Vernazza*, 1960 AC 965). The same principle is embodied in S. 6 of the General Clauses Act which is to the following effect:

"6. Effect of repeal—Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

x x x x x

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

x x x x x

(c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

6. The effect of the application of this principle is that pending cases,

although instituted under the old Act but still pending, are governed by the new procedure under the amended law, but whatever procedure was correctly adopted and concluded under the old law cannot be opened again for the purpose of applying the new procedure. In the present case, the trial of the appellant was taken up by the Special Judge, Santhal Parganas, when Section 5 (3) of the Act was still operative. The conviction of the appellant was pronounced on March 31, 1962 by the Special Judge, Santhal Parganas, long before the amending Act was promulgated. It is not hence possible to accept the argument of the appellant that the conviction pronounced by the Special Judge, Santhal Parganas, has become illegal or in any way defective in law because of the amendment to procedural law made on December 18, 1964. In our opinion, the High Court was right in invoking the presumption under S 5 (3) of the Act even though it was repealed on December 18, 1964 by the amending Act. We accordingly reject the argument of the appellant on this aspect of the case.

7. It was next argued on behalf of the appellant that the statutory safeguards under Section 5A of the Act have not been complied with and the Magistrate has not given reasons for entrusting the investigation to a police officer below the rank of Deputy Superintendent of Police. Section 5A of the Act provides as follows:

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank—

(a) in the presidency towns of Madras and Calcutta, of an assistant commissioner of police,

(b) in the presidency town of Bombay, of a superintendent of police, and

(c) elsewhere, of a deputy superintendent of police,

shall investigate any offence punishable under Section 161, Section 165 or Section 165A of the Indian Penal Code or under sub-section (2) of Section 5 of this Act, without the order of a presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant;

x x x x x "

In the present case the officer-in-charge of Sahibganj police station

(P.W. 45) filed a petition dated February 27, 1959 (Ex. 1) to the First Class Magistrate upon which the Deputy Superintendent of Police made an endorsement (Ex. 1/1) suggesting that Inspector Haldhar may be empowered to investigate the case. The order of the Magistrate is Ex. 1/2 and is dated February 27, 1959. The order states: "Inspector Sri M. S. Haldhar is allowed to do it" The evidence of P.W. 1 is that he was posted at Sahibganj as a Magistrate from 1956 and used to do the work of the Sub-Divisional Officer also in his absence. He passed the order (Ex. 1/2) authorising M. S. Haldhar to investigate the case because the Deputy Superintendent of Police used to remain busy with his work and the present case needed a whole-time investigation. It was argued on behalf of the appellant that there was nothing in the endorsement of the Deputy Superintendent of Police that he was busy and therefore the inquiry should be entrusted to Sri Haldhar. But the High Court has observed that P.W. 1 was a Magistrate working at Sahibganj for a period of two years prior to the passing of the order in question and he must have known that the Deputy Superintendent of Police could not devote his whole time to the investigation of the case and therefore the Inspector of Police should be entrusted to do the investigation. On this point the High Court has come to the conclusion that the order of the Magistrate was not mechanically passed and the permission of the Magistrate authorising Haldhar to investigate the case was not illegal or improper. In our opinion Counsel on behalf of the appellant has been unable to make good his argument on this point.

8. It was then said that the charge against the appellant under S. 5 (2) of the Act was defective as there were no specific particulars of misconduct as envisaged under cls. (a) to (d) of Section 5 (1) of the Act. It was suggested that the charge was defective inasmuch as it deprived the appellant of the opportunity to rebut the presumption raised under Section 5 (3) of the Act. The charge against the appellant reads as follows:

"First—that during the period of 1956 to 19th January, 1958 at Sahibganj Police Station, Sahibganj G.R.P. and Sahibganj Local, District Santhal Parganas and at other places, within and without the said district, you,

being a public servant, viz, Guard of trains in the Eastern Railway of the Railway Department and while holding the said post, habitually accepted or obtained from persons for yourself gratifications other than legal remuneration as a motive or reward such as mentioned in Sec 161 of the Indian Penal Code, habitually accepted or obtained for yourself valuable things without consideration or for a consideration which you know to be inadequate from persons having connection with your official function, habitually, dishonestly and fraudulently, misappropriated or otherwise converted for your own use properties entrusted to you or put under your control as a guard of trains or otherwise, and habitually by corrupt and illegal means, or by otherwise abusing your position as a public servant obtained for yourself valuable things or pecuniary advantage, with the result that during the search of your house at Sahebganj aforesaid on 19-1-1958 and during the investigation of the Sahebganj G.R. P.S. Case No. 12 dated 19-1-1958 under Section 170, etc., I.P.C., you were found, during the month of January 1958 in possession of cash amount to the extent of Rs. 59,000 and other properties fully described in the Appendix No. 1 attached herewith and forming part of this charge (of Sahebganj P.S. Case No. 11(2)59), and that the said cash amount and properties are disproportionate to your known sources of income and that you cannot satisfactorily account the possession of the same and that you thereby committed the offences of criminal misconduct, under clauses (a) to (b) of Section 5 (1) of the Prevention of Corruption Act, 1947 (Act II of 1947), punishable under Section 5 (2) of the said Act, within the cognizance of this Court.

x x x x x"

9. It was argued that the charge did not disclose the amounts the appellant took as bribes and the persons from whom he had taken such bribes and the appellant had therefore no opportunity to prove his innocence. But, in our view, this circumstance does not invalidate the charge, though it may be a ground for asking for better particulars. The charge, as framed, clearly stated that the appellant accepted gratification other than legal remuneration and obtained pecuniary advantage by corrupt and illegal means. The charge, no doubt, should

have contained better particulars so as to enable the appellant to prove his case. But the appellant never complained in the trial Court or the High Court that the charge did not contain the necessary particulars. The record on the other hand disclosed that the appellant understood the case against him and adduced all the evidence which he wanted to place before the Court. Section 225 of the Criminal Procedure Code says: "that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice". It also appears that the appellant never raised any objection either before the Special Judge or in the High Court on the score that the charge was defective and that he was misled in his defence on the ground that no particulars of the persons from whom the bribes were taken were mentioned. We accordingly reject the argument of the appellant on this point.

10. For the reasons expressed we hold that the judgment of the High Court dated September 14, 1965, is correct and this appeal must be dismissed.

Appeal dismissed

1970 CRI. L. J. 1401 (Vol. 76, C. N. 371) =
AIR 1970 SUPREME COURT 1661 (V 57 C 354)

(From: Patna)

A N RAY AND I. D. DUA, JJ.
Bhagwan Prasad Srivastava, Appellant
v. N. P. Mishra, Respondent.
Criminal Appeal No. 139 of 1967,
D/-20-4-1970.

Criminal P. C. (1898), S. 197—Sanction to prosecute public servant—Emphasis is on 'act' and not 'duty'—Section not to be interpreted too widely or too narrowly.

Section 197 is neither to be too narrowly construed nor too widely. It is not the "duty" which requires examination so much as the "act" because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. There

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must be a reasonable connection between the act and the discharge of official duty. The act must fall within the scope and range of the official duties of the public servant concerned. AIR 1956 SC 44 and AIR 1955 SC 309 and AIR 1966 SC 220, Rel. on.

(Para 5)

It is open to the accused to place material on the record during the course of the trial for showing what his duty as a public servant was and also that the impugned acts were inter-related with his official duty so as to attract the protection afforded by Section 197, Criminal P. C. AIR 1969 SC 686, Rel. on

(Para 6)

Where a Civil Assistant Surgeon had filed a complaint against the Civil Surgeon, that while in operation theatre the Civil Surgeon abused the complainant before patients and hospital staff and ordered the hospital cook to "turn out this badmash", meaning the complainant and the cook actually pushed out the complainant:

Held, that there was nothing to show that this act was a part of the official duty of the Civil Surgeon and that no sanction was required under Section 197 for prosecution of the Civil Surgeon

(Para 5)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 686
(V 56), Criminal Appeal
No. 152 of 1967, D/-29-11-1968,
Prabhakar V. Sinari v. Shankar
Anant Verlekar

(1966) AIR 1966 SC 220
(V 53) = 1966-1 SCR 210 =
1966 Cri LJ 179, Baijnath
Gupta v. State of M. P.

(1956) AIR 1956 SC 44
(V 43) = (1955) 2 SCR 925,
Matajog Dobey v. H. C. Bhari
(1955) AIR 1955 SC 309
(V 42) = (1955) 1 SCR 1302 =
1955 Cri LJ 865, Amrik Singh
v. State of Pepsu

The following Judgment of the Supreme Court was delivered by

DUA. J.:—In this appeal by special leave arising out of a complaint filed by the respondent Shri N. P. Mishra against the appellant Shri Bhagwan Prasad Srivastava, the only question requiring determination is if cognizance of the case by the Magistrate required previous sanction under Section 197, Criminal P. C. The Sub-Divisional Magistrate, in whose Court the complaint was instituted, upheld

the preliminary objection based on the absence of previous sanction and the Second Additional Sessions Judge, on revision, agreed with this view. On further revision the Patna High Court disagreed with the view taken by the two Courts below and holding S. 197, Criminal P. C., to be inapplicable to the case directed the Sub-Divisional Magistrate to make further inquiry into the petition of complaint. Before us the view taken by the High Court is assailed.

2. The complaint was filed by the respondent Shri N. P. Mishra, Civil Assistant Surgeon, Sadar Hospital, Chapra (hereinafter called 'the complainant') against Shri Bhagwan Prasad Srivastava, Civil Surgeon, Chapra (appellant in this Court) and Shri Ramjash Pandey, cook, Sadar Hospital, Chapra. It was alleged in the complaint that on the 6th and 7th January, 1964, the appellant had used defamatory language towards the complainant, and the two accused persons had insulted and humiliated him in the eyes of the public. As a result, the complainant was put to great mental pain and agony, his reputation was harmed and his professional career prejudicially affected. The relevant averments in the complaint may now be stated with the requisite detail. The complainant claiming to be a Master of Surgery and a specialist in Ophthalmology had joined Chapra Sadar Hospital as Civil Assistant Surgeon (C.A.S.) in January, 1962. The appellant joined the said hospital as Civil Surgeon towards the end of 1962. The appellant bore ill-will and malice towards the complainant and was always on the look out for an opportunity to harm him in his profession and to humiliate and disgrace him in the eyes of the public. Some cataract operations were to be performed on January 7, 1964, in the Blind Relief Camp to be organised for that purpose. On January 6, when the complainant was making final selection of the patients for the cataract operations to be performed on the following day, the appellant informed the complainant that he had not been able to arrange for cataract knives and that the complainant should arrange for them from somewhere. The complainant requested the appellant to place orders for the knives with some local firm and give him the necessary letter of authority so that the same

could be purchased on credit. The appellant apparently did not like this suggestion. He got enraged and in an insulting tone and language told the complainant that it was his job to arrange for the knives and that as a last resort he might bring his own knife. The complainant repeated his suggestion adding that in the alternative a man be sent to Patna to make local purchases. On this the appellant again addressed the complainant in highly defamatory language in the presence of the hospital staff and the attendants. On January 7, 1964, at about 9 a.m., the complainant was in the operation theatre. Some members of the hospital staff and some attendants of the patients who were waiting outside the operation theatre were also present. The appellant came there and again asked the complainant if he had brought two more cataract knives from somewhere. The complainant replied that in the absence of the appellant's final orders, the two knives could not be arranged from the local market. The appellant again got annoyed and addressed the complainant in insulting tone and defamatory language. Not satisfied with the use of such language, the appellant ordered Ramjesh Pandey, cook of the hospital, to turn out the complainant, the purport of the actual words used being "Pandey, turn out this badmash" (one who follows evil courses). To his utter humiliation the complainant was then actually pushed out by the cook. The actual words used in Hindi by the appellant have been reproduced in the judgment of the High Court. We have, therefore, not considered it necessary to reproduce them again, except the word 'badmash' of which the literal meaning in English as stated by us is generally well understood.

3. The question which falls for decision by this Court is whether the complainant's case is covered by Section 197, Cr. P. C. and previous sanction of the superior authority is necessary before the trial Court can take cognizance of the complaint.

4. Section 197, Cr. P. C., provides as under:

"(1) When any person who is a Judge within the meaning of Sec. 19 of the Indian Penal Code, or when any Magistrate or when any public servant who is not removable from his

office save by or with the sanction of State Government or the Central Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and

(b) in the case of a person employed in connection with the affairs of a State, of the State Government

Power of Central or State Government as to prosecution—(2) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held." The object and purpose underlying this section is to afford protection to public servants against frivolous, vexatious or false prosecution for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty. The larger interest of efficiency of State administration demands that public servants should be free to perform their official duty fearlessly and undeterred by apprehension of their possible prosecution at the instance of private parties to whom annoyance or injury may have been caused by their legitimate acts done in the discharge of their official duty. This section is designed to facilitate effective and unhampered performance of their official duty by public servant by providing for scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for their prosecution as a condition precedent to the cognizance of the cases against them by the Courts. It is neither to be too narrowly construed nor too widely. The narrow and pedantic construction may render it otiose for it is no part of an official duty — and never can be — to commit an offence. In our view, it is not the "duty" which requires examination so much as the "act" because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. One must also

guard against too wide a construction because in our constitutional set-up the idea of legal equality or of universal subjection of all citizens to one law administered by the ordinary Courts has been pushed to its utmost limits by enshrining equality before the law in our fundamental principles. Broadly speaking, with us no man, whatever his rank or condition, is above the law and every official from the highest down to the lowest is under the same responsibility for every act done without legal justification as any other citizen. In construing Section 197, Cr. P. C., therefore, a line has to be drawn between the narrow inner circle of strict official duties and acts outside the scope of official duties. According to the decision of this Court in *Matajog Dobey v. H. C. Bham*, (1955) 2 SCR 925 = (AIR 1956 SC 44), cited by Shri Sarjoo Prasad on behalf of the appellant there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. In *Amrik Singh v. State of Pepsu*, (1955) 1 SCR-1302 at p. 1307 = (AIR 1955 SC 309 at p. 312), this Court said:

"It is not every offence committed by a public servant that requires sanction for prosecution under Section 197 (1) of the Code of Criminal Procedure; nor even every act done by him while he is actually engaged in the performance of his official duties, but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution"

Recently in *Bajinath Gupta v. State of M. P.*, (1966) 1 SCR 210 = (AIR 1966 SC 220), this Court further explained that it is the quality of the act that is important and if it falls within the scope and range of the official duties

of the public servant concerned, the protection contemplated by Sec. 197 of the Criminal Procedure Code will be attracted.

5. The principle embodied in this section seems to be well understood, the difficulty normally lies in its application to the facts of a given case. The question whether a particular act is done by a public servant in the discharge of his official duty is substantially one of fact to be determined on the circumstances of each case. In the present case the alleged offence consists of the use of defamatory and abusive words and of getting the complainant forcibly turned out of the operation theatre by the cook. There is nothing on the record to show that this was a part of the official duty of the appellant as Civil Surgeon or that it was so directly connected with the performance of his official duty that without so acting he could not have properly discharged it.

6. As suggested by this Court in *Prabhakar V. Sinari v. Shankar Anant Verlekar*, Criminal Appeal No. 152 of 1967, D/-29-11-1963 = (reported in AIR 1969 SC 686); it would be open to the appellant to place material on the record during the course of the trial for showing what his duty as Civil Surgeon was and also that the impugned acts were inter-related with his official duty so as to attract the protection afforded by Section 197, Cr. P. C. We do not find any material on the existing record suggesting that the impugned acts were done by the appellant in the discharge of his official duty or that they are directly connected with it. This appeal accordingly must fail and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 1404 (Vol. 76, C. N. 372) =
AIR 1970 SUPREME COURT 1664
(V 57 C 355)

J. M. SHELAT, V. BHARGAVA,
C. A. VAIDIALINGAM AND
- I. D. DUA, JJ

Kshetra Gogoi, Petitioner v. State of Assam, Respondent

Writ Petn. No. 211 of 1969, D/-19-9-1969.

Public Safety — Preventive Detention Act (1950), S. 13 (2) — Fresh order of detention after expiry of previous order, served on day of expiry

DN/EN/E855/69/RGD/M

must disclose fresh grounds arising after expiry of previous detention—That detenu who was in jail maintained links, with his associates who had gone underground, during period of his detention, is not such fresh ground.

A fresh detention order under Section 13 (2) can be made on the revocation or expiry of a previous detention order only in cases where fresh facts have arisen after the date of revocation or expiry. AIR 1969 SC 43, Relied on. (Para 3)

When the fresh Order contains the grounds mentioned in the expired Order and one more ground that the detenu during his detention under the expired Order had been maintaining links with his associates who had gone underground, through his friends and relatives, it is very difficult to appreciate how a person in preventive custody could continue to maintain links with his associates outside jail who had gone underground even through his friends and relatives. If the detenu was able to maintain such links, it casts a sad reflection on the persons in charge of him while he was in custody and, in any case, it would appear that his detention could serve no useful purpose. It is, in fact, very doubtful whether any such contacts could possibly have been maintained. However, even if it is accepted that such links were maintained, this additional ground mentioned does not satisfy the requirements of Sec 13 (2) of the Act, because the only allegation is that the links were maintained during the period of preventive detention. Under Section 13 (2) what is required is that fresh facts should have arisen after the expiry of the previous detention. Facts arising during the period of detention are, therefore, not relevant when applying the provisions of Section 13 (2). The fresh order is in violation of law. (Para 4)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 43 (V 56) =

1969 Cri LJ 274, Hadibandhu Das v. District Magistrate, Cuttack

3

Mr. Hardev Singh, Advocate, amicus curiae, for Petitioner; Mr. Naunit Lal, Advocate, for Respondent.

The following Judgment of the Court was delivered by:

BHARGAVA, J.—The petitioner in this petition under Art. 32 of the Con-

stitution was arrested and detained under an order made under S 3 (1) (a) (ii) of the Preventive Detention Act, 1950 (hereinafter referred to as "the Act") on 24th April, 1968. On the 30th August, 1968, he filed a petition in the High Court of Assam under Art 226 of the Constitution for issue of a writ of Habeas Corpus. The same day he was released by the Government and, according to him, without being set at liberty, he was again put in detention in pursuance of a fresh order dated 29th August, 1968 passed under Section 3 (1) (a) (ii) of the Act. The grounds of detention were also served on the same day. He made his representation on 17th September, 1968 and his case was referred to the Advisory Board also on the same date. The report of the Advisory Board was received on 28th October, 1968. On 7th November, 1968, his order of detention was confirmed by the Government on the basis of the report of the Advisory Board. This petition was then received in this Court from the petitioner in July, 1969, challenging his detention under the order dated 29th August, 1968. The petition came up for hearing before a Bench of this Court on 29th Aug., 1969, when, at the request of the counsel for the State of Assam, time was granted by the Court till 8th September, 1969 to send for full material. Meanwhile, it appears that a fresh order for his detention under Section 3 (1) (a) (ii) of the Act was issued on 28th August, 1969 and this order was served on the petitioner in Delhi on 29th August, 1969, after the adjournment had been obtained from this Court. Thereupon, the petitioner, on 1st September, 1969, filed an application for amendment of the writ petition and for adding additional new grounds so as to challenge the validity of his detention under the order dated 28th August, 1969. The grounds of detention under this new order were also served on the petitioner on 29th August, 1969. When this petition came up for hearing before us on 9th September, 1969, learned counsel for the State of Assam stated that no material had been received from the Government and wanted time to be granted to meet the facts put forward in the application dated 1st September, 1969. It appears that, though an officer was sent by the Government of Assam to

Delhi to serve the order dated 28th August, 1969 on the detenu which he did on 29th August, 1969; no attempt was made to obtain the material for which time had been obtained from the Court on 29th August, 1969. If a fresh order had been passed and had been served on the petitioner in supersession of the previous order which was challenged in the writ petition, the State Government should have sent full material relating to this order which it became necessary for the petitioner to challenge by amending his writ petition. Detention of a person without trial, even for a single day, is a matter of great consequence and, hence, we did not consider that in the circumstances mentioned above, there was any justification for granting further time to the State Government to obtain material and file a reply to this application dated 1st September, 1969.

2. In view of the facts mentioned above, it is clear that the validity of the order of detention dated 29th August, 1968, which was first challenged in the petition, has become immaterial because the petitioner is now under detention by virtue of the fresh order dated 28th August, 1969 served on him on 29th August, 1969. In the counter-affidavit filed it was stated that the first order of detention dated 24th April 1968 had automatically lapsed, because that order did not receive the approval of the State Government within 12 days as required by Section 3 (3) of the Act. This admission would indicate that, after the expiry of those 12 days, the petitioner's detention was not justified by any valid order passed in law until the second detention order was served on him on the 30th August, 1968 after releasing him from custody. However, in the present writ petition, we are not concerned with the effect of this procedure adopted by the State Government, because, even if it be assumed that the second order of detention was validly served on the petitioner on 30th August, 1968, the period of that detention expired on 28th August, 1969 in view of Section 11-A of the Act which prescribes a maximum period of 12 months for detention under the Act on the basis of an order passed under Section 3 of the Act. On 29th August, 1969, the detention under the second order dated 29th August, 1968 having expired, the State Government passed this third order of

detention and served it on the petitioner while he was still in custody in Delhi. The question is whether the further detention under this third order is valid.

3. The provision contained in Section 11-A (2) of the Act clearly lays down the intention of Parliament that, on the basis of grounds found to exist at one time, the maximum period of detention under Section 3 should be 12 months and no more. On the expiry of that period, that order of detention would lapse; but a fresh order of detention is permitted to be passed under Section 13 (2) of the Act which is as follows:—

"13. (2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such order should be made." This provision clearly lays down that a fresh detention order can be made on the revocation or expiry of a previous detention order only in cases where fresh facts have arisen after the date of revocation or expiry. This principle was explained by this Court in *Hadibandhu Das v. District Magistrate, Cuttack*, AIR 1969 SC 42, where it was held.

"On January 28, 1968, the State of Orissa purported to revoke the first order and made a fresh order. The validity of the fresh order dated January 28, 1968, made by the State of Orissa is challenged on the ground that it violates the express provisions of Section 13 (2) of the Preventive Detention Act. In terms that sub-section authorises the making of a fresh detention order against the same person against whom the previous order has been revoked or has expired in any case where fresh facts have arisen after the date of revocation or expiry, on which the detaining authority is satisfied that such an order should be made. The clearest implication of Section 13 (2) is that after revocation or expiry of the previous order, no fresh order may issue on the grounds on which the order revoked or expired had been made. In the present case, the order dated December 15, 1967,

passed by the District Magistrate, Cuttack, was revoked on January 28, 1968, and soon thereafter a fresh order was served upon the appellant. It is not the case of the State that any fresh facts which had arisen after the date of revocation on which the State Government was satisfied that an order under Section 3 (1) (a) (ii) may be made. There was a fresh order but it was not based on any fresh facts."

In view of this decision, we have to see whether, in the present case, the requirements laid down by Sec. 13 (2) of the Act for making a fresh order were or were not satisfied. The main requirement is that the order must be made not merely on the past grounds, but on fresh facts which have arisen after the date of expiry.

4. In the present case, we have compared the grounds of detention served in pursuance of the order dated 28th August, 1969, with the grounds of detention which were served on the petitioner in pursuance of the second detention order dated 29th August, 1968, and we find that the two are identical, except that two small paragraphs have been added when serving the grounds of detention in respect of the detention order dated 28th August, 1969. These paragraphs are as follows:

"That though in preventive custody, he has been maintaining links with Shah Syed Hussain and other associates, who went underground in Nagaland, through his friends and relatives Shah Syed Hussain and his gang since received some arms and explosives from Naga rebels for committing acts of sabotage and creating large-scale disturbances, particularly in the plains areas along Assam-Nagaland border.

That, in the circumstances, Shri Kshetra Gogoi's being at large will jeopardise the security of the State and the maintenance of public order in this region."

The first one of these two paragraphs is the only one that purports to mention some ground in addition to the grounds which were included amongst the grounds which were the basis of the order dated 29th August, 1968. We have found it very difficult to appreciate how a person in preventive custody could continue to maintain links with his associates outside jail who had gone underground even

through his friends and relatives. If the present petitioner was able to maintain such links, it casts a sad reflection on the persons in charge of him while he was in custody and, in any case, it would appear that his detention could serve no useful purpose. It appears to us to be, in fact, very doubtful whether any such contacts could possibly have been maintained. However, even if we accept that such links were maintained, this additional ground mentioned does not satisfy the requirements of Section 13 (2) of the Act, because the only allegation is that the links were maintained during the period of preventive detention. Under Section 13 (2) what is required is that fresh facts should have arisen after the expiry of the previous detention. Facts arising during the period of detention are, therefore, not relevant when applying the provisions of Section 13 (2). In the present case, the fresh order was passed on 28th August 1969, a day before the expiry, and it is obvious that no fresh facts could by that date arise and yet be held to have arisen after the date of expiry. The order dated 28th August, 1969 was therefore, not at all justified under Section 13 (2) of the Act and that order being in violation of the provisions of the Act has to be held to be invalid, so that the detention under that order is illegal. The petition is allowed. The petitioner shall be set at liberty forthwith.

Petition allowed.

1970 CRI. L. J. 1407 (Vol. 76, C. N. 373)

AIR 1970 SUPREME COURT 1694
(V 57 C 360)

(From Kerala: AIR 1968 Kerala 301)

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

A. K. Gopalan and another, Appellants v. Noordeen, Respondent

Criminal Appeal No 71 of 1968, D/-15-9-1969

Contempt of Courts Act (1952), section 1 — Proceedings cannot be said to be imminent only when F. I. R. is filed but accused are not arrested — Statement published after arrest of accused is publication when proceedings are imminent. AIR 1968 Ker 301, Reversed.

EN/EN/E827/69/RGD/P

Lodging of a first information report does not by itself establish that proceedings in a court were imminent. It would depend on the facts proved in a particular case whether the proceedings are imminent or not. Where there are no other facts which tend to establish the imminence of proceedings in a court except the lodging of F. I. R. and the accused were not arrested and if it be relevant there was no proof that arrest was imminent when the impugned statement was made, it cannot be said that proceedings were imminent when the statement was made. Ordinarily until an accused is arrested it cannot be said that any proceedings in a court are imminent against that person because he may never be arrested or he may be arrested after a lapse of months or years. *Cri App 107 of 1958, D/- 23-1-1961 (SC) Ref. on; AIR 1968 Kerala 301, Reversed* (Para 7)

But when such a statement though made before the arrest of the accused, was published after the arrest of the accused, the publication is when proceedings are imminent, and can be subject matter of a charge for contempt of courts. (Para 11)

Dictum—(Per Sikri and P. Jaganmohan Reddy JJ.)

It would be an undue restriction on the liberty of free speech to lay down that even before any arrest has been made there should be no comments on the facts of a particular case. In some cases no doubt, especially in cases of public scandal regarding companies, it is the duty of a free press to comment on such topics so as to bring them to the attention of the public. (Para 8)

Per Mitter J. (Contra) — The consensus of authorities, both in England and in India is that contempt of court may be committed by any one making comment or publication of the exceptionable type if he knows or has reason to believe that proceedings in court, though not actually begun, are imminent (Para 16)

A contempt of court may be committed by a person when he knows or has good reason to believe that criminal proceedings are imminent. The test is whether the circumstances in which the alleged contemner makes the statement are such that a person of ordinary prudence would be of

opinion that criminal proceedings would soon be launched. Case law Ref. (Para 24)

Held on facts that when the statement was made after lodging of F. I. R. but before the arrest of the accused, it was not possible to hold that at that time such proceedings were not imminent or that the maker of the statement had no reasonable cause to believe that they were not imminent. (Para 17)

Cases Referred: Chronological Paras

(1966) 3 All ER 439 = 1368-1	
- WLR 1761, R. v. Savundranayan and Walker	8, 19, 24
(1962) 1962-3 All ER 326, Attorney-General v. Butterworth	24
(1961) Cri App No. 107 of 1958, D/- 23-1-1961 (SC), Surendra Mohanty v. State of Orissa	5, 7, 21, 24
(1957) 1957-1 QB 73=1956-3	
All ER 494, Regina v. Odhams Press Ltd	19
(1943) AIR 1943 Lah 329 (V 30)= ILR 25 Lah 111, In the matter of "Tribune" Lahore	20
(1939) AIR 1939 Mad 257 (V 26)= ILR (1939) Mad 466 = 40 Cri LJ 533 (SB), Tuljaram Rao v. Sir James Taylor	20
(1927) 1927-1 KB 845 = 96 LJKB 352, R v. Daily Mirror	19
(1903) 1903-2 KB 432 = 89 LT 439, Rex v. Parke	18

Mr. A S R. Chari, Sr. Advocate (Mr. B. R. G. K. Achar, Advocate, with him) for Appellants, Mr. A. C. Jose, Advocate, M/s S K Mehta and K. L. Mehta, Advocates of M/s K. L. Mehta and Co. and Miss Sona Bhatiani, Advocate, for Respondent; Mr. M. R. K. Pillai Advocate, for Advocate General, for State of Kerala

The following Judgments of the Court were delivered by

SIKRI, J.: (For himself and P. Jaganmohan Reddy J.) — In this appeal by certificate of fitness granted by the Kerala High Court two questions arise (1) Whether on the day when the appellant, A. K. Gopalan, made the statement complained of or when it was published in "Deshabhimani" any proceedings in a court could be said to be imminent; and (2) whether this statement amounts to contempt of court.

2. The facts in brief are that on September 11, 1967, the ruling parties

in Kerala State staged what is called 'Kerala Bandh'. A serious incident took place on that day during the course of which one C. P. Karunakaran lost his life at a place called Kuttoor. A first information report was lodged on that very day. On September 12, 1967 the first information report was transferred to another police station. On September 20, 1967, the appellant, A. K. Gopalan, made the following statement:

"Tearful story.

It was the story of a young man who had to sacrifice his life to the naked goondaism of Congressmen, that was heard from the trembling lips of so many people in Kuttoor. Had this tragedy occurred in the course of a sudden fight one could have understood it. But what I was able to make out was that it was in prosecution of a deliberate conspiracy to commit murder. It appears that a prominent Congress leader of the Cannanore District had given instructions for this the previous day. It was as a result of being pounced upon and stabbed while he was in a peaceful and disciplined manner calling for the observance of the Bandh by the closure of shops that Comrade C. P. Karunakaran suffered martyrdom. Comrade Kunhikannan who was with him also suffered serious injuries. The police have seized an unlicensed loaded gun and other weapons from the shop of a congressman at the scene of occurrence.

Murder too was planned.

Is it not to be inferred from all this that there was a pre-arranged plan to commit murder? The enlightened people of the locality were determined to press forward to the chosen destination of that class for whom Comrade Karunakaran has sacrificed his life."

3. On September 23, 1967 K. P. Noordeen was arrested along with his two brothers. On September 24, 1967 the Magistrate remanded the accused to police custody. In its issue dated September 25, 1967, the Malayalam Daily newspaper called "Deshabhimani" of which P. Govinda Pillai, the second appellant, was the editor and M. Govindankutty was the printer, printed the statement which we have reproduced above. On September 29, 1967, all the three accused were produced before the Magistrate. On October 5, 1967, bail was refused by the District Magistrate but was granted

by the Sessions Judge. On November 1, 1967, Noordeen filed the petition under Ss. 3 and 4 of the Contempt of Court's Act (32 of 1952) impleading the three respondents, A. K. Gopalan, P. Govinda Pillai and M. Govindankutty.

4. The High Court held all the three respondents guilty of contempt of court and convicted them accordingly. The High Court imposed a sentence of fine of Rs. 200 on the first respondent and of administering an admonition to respondents 2 and 3. The High Court discharged respondents two and three after due admonition. The appellants A. K. Gopalan and P. Govinda Pillai having secured certificate of fitness under Article 134 (1) (c) the appeal is now before us.

5. This Court in Surendra Mohanty v. State of Orissa, Cri Appl. No 107 of 1958, D/- 23-1-1961 (SC) examined the question whether the publication of a statement at a time when the only step taken was the recording of first information report under S. 154, Cr. P. C., could be contempt of court. As the judgment in this case has not been reported we think that we should reproduce the main portion of the judgment. Kapur, J., speaking on behalf of the court, observed:

"Before the publication of the comments complained of, only the first information report was filed in which though some persons were mentioned as being suspected of being responsible for causing the breach in the bund, there was no definite allegation against any one of them. In the charge-sheet subsequently filed by the police these suspects do not appear to be amongst the persons accused. It was, therefore, argued that by the publication there could not be any tendency or likelihood to interfere with the due course of justice. The learned Additional Solicitor-General for the State submitted on the other hand that if there was a reasonable probability of a prosecution being launched against any person and such prosecution be merely imminent, the publication would be a contempt of court.

The Contempt of Courts Act confers on the High Courts the power to punish for the contempt of inferior courts. This power is both wide and has been termed arbitrary. The courts must exercise this power with circumspection, carefully and with restraint

and only in cases where it is necessary for maintaining the course of justice pure and unaffected. It must be shown that it was probable that the publication would substantially interfere with the due course of justice; commitment for contempt is not a matter of course but within the discretion of the court which must be exercised with caution. To constitute contempt it is not necessary to show that as a matter of fact a judge or a jury will be prejudiced by the offending publication but the essence of the offence is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings will have to go on and a tendency to interfere with the due course of justice or to prejudice mankind against persons who are on trial or who may be brought to trial. It must be used to preserve citizens' right to have a fair trial of their causes and proceedings in an atmosphere free of all prejudice or prepossession. It will be contempt if there is a publication of any news or comments which have a tendency to or are calculated to or are likely to prejudice the parties or their causes or to interfere with due course of justice.

As to when proceedings begin or when they are imminent for the purposes of the offence of contempt of court must depend upon the circumstances of each case, and it is unnecessary in this case to define the exact boundaries within which they are to be confined.

The filing of a first information report does not, by itself, establish that proceedings in a court of law are imminent. In order to do this various other facts will have to be proved and in each case that question would depend on the facts proved."

6. Then Kapur, J. examined the facts of that case and observed:

"In the present case all that happened was that there was a first information report made to the police in which certain suspects were named: they were not arrested, investigation was started and on the date when the offending article was published no judicial proceedings had been taken or were contemplated against the persons named in the first information report. Indeed after investigation the suspects named in that report were not sent up for trial. At the date this

offending publication was made there was no proceeding pending in a court of law nor was any such proceeding imminent."

7. On the first point it seems to us clear that on the facts of this case it cannot be said that any proceedings were imminent on September 20, 1967 in a Court. It is true that the first information report was lodged on September 11, 1967, but this Court has definitely held in Surendra Mohanty's case, Cri Appl. No. 107 of 1958 D/-23-1-1961 (SC) that lodging of a first information report does not by itself establish that proceedings in a court were imminent. This court further said that it would depend on the facts proved in a particular case whether the proceedings are imminent or not. There are no other facts which tend to establish the imminence of proceedings in a court. Even the accused were not arrested till September 23, 1967 and even if it be relevant there is no proof that arrest was imminent on September 20, 1967. Ordinarily until an accused is arrested it cannot be said that any proceedings in a court are imminent against that person because he may never be arrested or he may be arrested after a lapse of months or years.

8. It would be an undue restriction on the liberty of free speech to lay down that even before any arrest has been made there should be no comments on the facts of a particular case. In some cases no doubt, especially in cases of public scandal regarding companies, it is the duty of a free press to comment on such topics so as to bring them to the attention of the public. As observed by Salmon, L. J., in *R. v. Savundranayagan and Walker*, 1968-3 All ER 439. "It is in the public interest that this should be done. Indeed, it is sometimes largely because of facts discovered and brought to light by the press that criminals are brought to justice. The private individual is adequately protected by the law of libel should defamatory statements published about him be untrue, or if any defamatory comment made about him is unfair". Salmon, L. J., further pointed out that "no one should imagine that he is safe from committal for contempt of court if, knowing or having good reason to believe that criminal proceedings are imminent, he

chooses to publish matters calculated to prejudice a fair trial."

9. The learned counsel for the State urges that the crucial date is not September 20, 1967, when the statement was made, but September 25, 1967, when the newspaper published the statement. The latter date may be relevant in the case of the other appellant but as far as Gopalan is concerned it is September 20, 1967, which is the relevant date. There is no evidence that he was instrumental in getting this statement published on September 25, 1967.

10. We are accordingly of the opinion that the appellant Gopalan was wrongly convicted by the High Court. There is no evidence that any proceedings in a court were imminent.

11. Let us now examine the case of P. Govinda Pillai, the second appellant. The statement was published, as we have already said, in the daily newspaper called "Deshabhimani" on September 25, 1967. Were any proceedings in a court imminent on that date? The accused had already been arrested on September 23, 1969, in a serious cognizable case. Arrest means that the police was prima facie on the right track. The accused must have been produced before a magistrate within 24 hours of the arrest in accordance with Article 21 of the Constitution, and the magistrate must have authorised further detention of the accused. In these circumstances it is difficult to say that any proceedings in a court were not imminent on that date. The fact that the police may have after investigation come to the conclusion that the accused was innocent does not make the proceedings any the less imminent. Proceedings in a court may be imminent on one day and yet not be brought the next day. For instance, the accused may in the meantime die or he may be proved innocent. To advance the day of imminence to the day when the police makes a report under S 173, Cr. P. C. would do untold harm to those who may actually be ultimately prosecuted. Not only will it tend to harm the accused but would also tend to subvert the scheme of our criminal law and procedure. It would subvert it because it would tend to encourage public investigation of a crime and a public discussion of the character and antecedents

of an accused in detention. The investigation of a cognizable case is eminently the province of the police, and if a person has information relevant to the commission of a particular crime there is nothing to prevent him from transmitting it to the police. This it seems to us would be the ordinary rule in the case of an investigation of a murder. It may be that in an investigation involving prolonged examination of account books of companies and the ramifications of a conspiracy, proceedings may not be said to be imminent as soon as the accused is arrested. Some of these cases take a long time to investigate and as observed by this court, it is difficult to lay down any inflexible rule. But as far as an investigation of a charge of murder is concerned once an accused has been arrested proceedings in court should be treated as imminent.

12. In view of this conclusion, we must hold that as far as the appellant P. Govinda Pillai is concerned proceedings in a court were imminent on September 25, 1967.

13. It has not been argued that Govinda Pillai did not know of the arrest of the accused or that he had good reasons to believe that no arrest had been effected by September 25, 1967. It is true that the statement does not mention the name of the accused but it does suggest that the person who committed the deliberate murder was acting as a result of a conspiracy and it was not a case of a sudden fight. It seems to us that the statement would tend to prejudice mankind against the accused.

14. In the result we maintain the conviction entered by the High Court against the appellant P. Govinda Pillai.

15. Accordingly the appeal of A. K. Gopalan is allowed and the appeal of P. Govinda Pillai dismissed. The fine, if already paid by A. K. Gopalan, shall be refunded.

16. MITTER, J.:— With respect I agree with the order proposed as regards Govinda Pillai but I am unable to concur in allowing the appeal of the first appellant. The facts are, stated sufficiently in the judgment of my learned brother and need not be repeated. He has held and indeed there can be no doubt that any publication or comment which has a tendency to or is calculated or likely to prejudice

the parties or their causes or with the due course of justice in pending proceedings would constitute a contempt of court. It is also universally accepted that even if proceedings have not actually begun but are imminent conduct of the kind referred to above would be punishable. In my view the consensus of authorities both in England and in India is that contempt of court may be committed by any one making a comment or publication of the exceptionable type if he knows or has reason to believe that proceedings in court though not actually begun are imminent. There does not appear to be any decision of this Court on the last aspect and it is therefore necessary to make a brief reference to the authorities.

17. It is agreed that there were no proceedings pending in a court when the first appellant made his statement on September 20, 1967 which was actually published in the Malayalam Daily newspaper in its issue dated September 25, 1967. In my view although no criminal proceedings were actually pending in any court on 20th September, it is not possible to hold that at that time such proceedings were not imminent or that the first appellant had no reasonable cause to believe that they were not imminent.

18. The Contempt of Courts Act, 1952 does not purport to define what actually constitutes such contempt. This was done with a purpose as attempts to interfere with the course of justice are of so many different kinds and may be committed in circumstances so various that the Legislature possibly thought it unwise to define the limits thereof. Courts in India have referred to the manifold aspects of the law of Contempt of Court and accepted the principles laid down in English decisions which go back to a date well over a century. Early in the present century in *Rex v. Parke*, 1903-2 KB 432 one Dougal was brought up before the petty Sessions of Saffron Walden charged with forgery and remanded without any evidence being taken. Articles to his disadvantage appeared in a newspaper of which the defendant was the editor. A rule was issued by the High Court to show cause why he should not be committed for contempt of Court. A point was taken that the jurisdiction would not be attracted if at the time of the publi-

cation of the article complained of there were no proceedings actually pending in any Court but the petty Sessions Court and that the jurisdiction to punish the publishers of articles of the kind before the Court was confined to cases in which at the moment of publication there was some cause actually pending in the High Court. In rejecting this contention Wills, J., observed:

"The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned..... If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular Court which is thus sought to be deprived of its independence, and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not."

Dealing with the argument that the remedy only existed when there was a cause pending in the Court the Judge said:

"...in very nearly all the cases which have arisen there has been a cause actually begun so that the expression quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased"

In a recent judgment of the Court of Appeal in England observations have been made which run counter to the dictum in the last sentence.

19. The last extract from the judgment of Wills, J., was quoted by Lord Hewart, C J in *R v. Daily Mirror*, 1927-1 KB 845 at p 851 and by Lord Goddard, C J in *Regina v. Odhams Press Ltd.*, 1957-1 QB 73 at p 81. Dealing with the question whether mens rea was necessary to constitute

the offence the learned Chief Justice said:

"It is obvious that if a person does not know that proceedings have begun or are imminent, he cannot by writing or speech be said to influence the course of justice or to prejudice a litigant or accused person, but that is no answer if he publishes that which in fact is calculated to prejudice a fair trial."

In 1968-5 All ER 439 to be referred to in detail later, the Court of Appeal in England expressed similar views in no unmistakable terms.

20. We may now turn to the decisions of our High Courts. In *Tuljaram Rao v. Sir James Taylor*, ILR (1939) Mad 466 at p. 476 = (AIR 1939 Mad 257 at pp. 259-260) and in the matter of "Tribune", Lahore, ILR 25 Lah 111 = (AIR 1943 Lah 329) opinions were expressed that a comment on proceedings which were imminent but not yet launched in Court with knowledge of the fact was as much a contempt as a comment of a case actually launched. According to the Lahore High Court it was sufficient that the proceedings were imminent to the knowledge of the person charged with contempt.

21. It was pointed out in Cri. Appl. No. 107 of 1958, D/-23-1-1961 (SC) that:

"As to when proceedings begin or when they are imminent for the purposes of the offence of contempt of Court must depend upon the circumstances of each case and it is unnecessary in this case to define the exact boundaries within which they are to be confined.

The filing of a first information report does not, by itself, establish that proceedings in a Court of law are imminent. In order to do this various other facts will have to be proved and in each case that question would depend on the facts proved."

The facts in *Surendra Mohanty's* case, Cri. Appl. No. 107 of 1958, D/-23-1-1961 (SC), were that there was a breach in a bund in a big reservoir between August 12 and 13, 1953 as a result of which some fields were flooded. On August 13, 1953, a first information was lodged at a police station stating that it had been cut and the cutting was suspected to have been done by one or more of the persons

whose names were therein mentioned. The police thereupon started investigation and on the 24th September under the orders of the Sub-Divisional Magistrate statements of five witnesses were recorded presumably under Section 164, Criminal P. C. On October 26, 1953, a report called the charge-sheet for an offence under Section 430, I. P. C., was received by the Magistrate who took cognizance and summoned the persons accused therein and the proceedings were continued in the Court of the Magistrate. Between August 14 and October 26, 1953, two Oriya papers published comments in regard to the incident thus:

"In the year 1952, a water reservoir had been constructed at Dangarpara in the Titlagarh Sub-Division of the District of Bolangir by the Government at a cost of Rs. 33,000. This has been breached due to heavy rainfall. It is heard that 15 days before the breach of this bund, Abhut Sankh, Chintamani Subudhi and Bhagban Das and others of Lakhana on seeing the condition of the reservoir apprehended a breach and brought it to the notice of the S. D. O. and requested him to open an escape for the discharge of the surplus water. But in spite of hearing this, the S. D. O. did not open an escape. When there was excessive accumulation of water, the Bund was unable to withstand and gave way.

It is heard that the S.D.O., in order to conceal his own fault, is accusing Mangra Najhi of Bana Bahal, Nilamani Mahakud of Kumanbahal and Satya Ganda, Banamali, Nariha and others of Dangarpara of the offences of cutting the bund and trying to create evidence by assaulting them through the police and by keeping watch (over the locality).

If actually the aforesaid persons had reported to the S.D.O. regarding the said bund and the S. D. O. neglected in taking proper steps himself, why he should not be responsible for this." This Court held that the order of conviction by the High Court could not be sustained in view of the facts that on the date when the offending article was published no judicial proceeding had been taken or were contemplated against the persons named in the first information report. According to the report the breach was not caused through any natural cause but was

due to cutting by some persons who were suspected. Indeed, after investigation the suspects named in that report were sent up for trial. On the date when the offending publication was made, there was no proceeding pending in a Court of law nor was any such proceeding imminent.

22. It is difficult to hold on the facts of this case that the first appellant did not know or had no reason to believe that proceedings in Court were not imminent when he made the statement on 20th September. It is common knowledge that whenever a man loses his life through a cause other than natural, the police will invariably come to the scene, take custody of the dead body and start investigations. Indeed under Section 174, Cr. P. C., even when information is received that a person had died under circumstances raising a reasonable suspicion that some other person has committed an offence, it is the duty of the officer in charge of the police station within whose jurisdiction the death occurs to give intimation thereof to the nearest Magistrate empowered to hold inquest and to proceed to the place where the body of such deceased person is, to make an investigation and draw up a report.

23. Here a person lost his life in broad daylight not by accident but by stabbing when two groups of people clashed. One of the groups was charged by the statement of the first appellant to be guilty of deliberate conspiracy to commit murder and it was further alleged that a prominent member of that party had given instructions for this, the day prior to the violent disturbance. The first appellant was not an illiterate person who could not be reasonably expected to know that criminal proceedings were bound to be launched in respect of the affair, whether anybody would be successfully prosecuted is a different matter, but that would depend upon the evidence which would be brought before the Court. But no person with any experience of worldly affairs, much less a person of the standing of the first appellant, a member of Parliament and a leader of a political group could be ignorant of the fact that a murder in broad daylight when two groups of people clash is sure to be investigated into and made the subject of criminal proceedings. The

statement of the appellant suggests that he had made some personal enquiries in the matter and had come to gather therefrom that certain members of a particular political party had entered into a conspiracy to murder and had actually carried their plan into execution. He had also charged a leader of a rival party, who was not named, with having given instructions the previous day. There can be no doubt that the motive and the object was not only to further the cause of a particular political party but also to create an atmosphere of prejudice against members of that party and charge some of them with one of the most serious offences known to law, namely, that of conspiracy to murder followed by actual homicide.

24. In the case of 1968-3 All ER 439 (supra) the Court of Appeal in England, although of opinion that a free press had the right and duty to comment on topics of public interest so as to bring them to the attention of public like the failure of an insurance company in which the moving figure was a man with an unsavoury record who appeared to have used large sums of the company's money for his own purposes and disappeared abroad at a point of time when there was nothing to suggest that criminal proceedings were even in contemplation, yet took a different view of the television programme depicting an interview with the appellant shortly after his return to England, when, according to the Court

"it must surely have been obvious to everyone that he was about to be arrested and tried on charges on gross fraud"

Salmon, L J added.

"It must not be supposed that proceedings to commit for contempt of Court can be instituted only in respect of matters published after the proceedings have actually begun. No one should imagine that he is safe from committal for contempt of Court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matters calculated to prejudice a fair trial."

How jealously Courts of law regard the preservation of the purity of the course of justice and the prevention and punishment of any attempt at pollution or perversion thereof as a

solemn obligation will appear from a recent decision of the English Court of Appeal in Attorney-General v. Butterworth, 1962-3 All ER 326. The words of Lord Denning, M.R. are worth repeating. He said:

"I have no hesitation in declaring that the victimisation of a witness is a contempt of Court, whether done while the proceedings are pending or after they have finished. Such a contempt can be punished by the Court itself before which he has given evidence: and so that those who think of doing such things may know where they stand. I would add that, if the witness has been damnified by it, he may well have redress in a Civil Court for damages".

In my view, we should hold that a contempt of Court may be committed by a person when he knows or had good reason to believe that criminal proceedings are imminent. The test is whether the circumstances in which the alleged contemner makes the statement are such that a person of ordinary prudence would be of opinion that criminal proceedings would soon be launched. In my way of thinking the first appellant must have realised on September 20, 1967 that the investigation by the police was sure to lead to cognizance of the offence being taken by a Magistrate and the prosecution of some persons for the offence of culpable homicide. His statement itself shows that to his knowledge the police were on the track of the guilty and had seized an unlicensed loaded gun and other weapons from the shop of a person belonging to a political party some members whereof were being accused of the crime. I would, therefore, dismiss the appeal by the first appellant also.

25. ORDER: In accordance with the opinion of the majority, the appeal of A. K. Gopalan is allowed and the appeal of P. Govinda Pillai is dismissed. The fine, if already paid by A. K. Gopalan, shall be refunded.

Order accordingly

1970 CRI. L. J. 1415 (Vol. 76, C. N. 374) =
AIR 1970 SUPREME COURT 1566 (V 57 C 331)
(From: Punjab)

A. N. RAY AND I. D. DUA, JJ.

Tapinder Singh, Appellant v. State of Punjab and another, Respondents.

Criminal Appeal No. 244 of 1969, D/- 7-5-1970.

(A) Criminal P. C. (1898), S. 154 — First information reports — What constitutes — Anonymous telephone message at police station that firing had taken place at a taxi stand — Mere fact that this information was first in point of time does not by itself clothe it with character of first information report. (Para 4)

(B) Criminal P. C. (1898), S. 162(2) — Dying declaration — Falls within S. 32 (1) Evidence Act and is outside prohibition in Section 162 (1) and is relevant. (Para 4)

(C) Constitution of India, Article 136 — Appraisal of evidence by Supreme Court — Evidence given by eye-witnesses believed by High Court — Supreme Court will not ordinarily examine evidence afresh for itself — Original document missing from record — Case being of a serious nature Supreme Court undertook to examine evidence in respect of the document. Criminal Appeal No. 126 of 1963, D/- 10-8-1965 (SC), Rel. on. (Para 4)

(D) Evidence Act (1872), Section 32 — Dying declaration — Admissibility — Duty of Court — Conviction on its basis.

A dying declaration is admitted in evidence on the principle of necessity. The fact that it is not tested by cross-examination on behalf of the accused merely serves to put the Court on its guard by imposing on it an obligation to scrutinize all the relevant circumstances. If the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence the Court can act upon it and convict the accused. AIR 1958 SC 22 and AIR 1962 SC 439, Rel. on.

(Para 5)

(E) Penal Code (1860), Section 302 — Sentence — Offence committed deliberately and pre-planned — Capital sentence held not excessive.

(Para 8)

Cases Referred: Chronological Paras

- (1965) Criminal Appeal No. 120 of 1963, D/- 10-8-1965 (SC), Ishwarlal Nanilal v. State of Gujarat 4
- (1964) AIR 1964 Punj 508 (V 51) = 1964 (2) Cri LJ 718, Saroop Singh v. State of Punjab 4
- (1962) AIR 1962 SC 439 (V 49) = 1962 Supp (1) SCR 104, Harbans Singh v. State of Punjab 5
- (1958) AIR 1958 SC 22 (V 45) = 1958 SCR 552 = 1958 Cri LJ 106, Khushal Rao v. State of Bombay 5

The following Judgment of the Court was delivered by

DUA, J.— In this appeal by special leave the appellant challenges his conviction and sentence under Section 302, I P. C. for the murder of his brother-in-law (husband of his wife's sister). The occurrence is stated to have taken place on Sunday October 8, 1968 at about 4.45 p. m. near the clock tower in Ludhiana City. It is not disputed that on August 13, 1968 the appellant Tapinder Singh, a business man and a Municipal Commissioner, had lodged a first information report (Ex. PR) with the police station, Sadar, Ludhiana against Kulwant Singh, deceased whom he described as his Sandhu (his wife's sister's husband) and one Ajit Singh, alleging that on the pretext of consulting him they had taken him in their car to the canal near the Agricultural College and after getting down from the car, when they had walked about 150 paces on the banks of the canal, the deceased Kulwant Singh, saying that he would teach the appellant a lesson, whipped out a clasp-knife and attacked him. Ajit Singh also shouted that the appellant should not be allowed to escape. The appellant raised alarm and tried to run away. While endeavouring to ward off with his right hand the knife blow by Kulwant Singh the appellant's right hand palm got wounded and started bleeding. Just at that moment Gurmeh Singh, Sarpanch and Shamsheer Singh, Lambardar, happened to pass that way in a car. They stopped the car. In the meantime Kulwant Singh and Ajit Singh got into their car and went away. Pursuant to this report admittedly a criminal case was pending against the deceased when the occurrence in question took place. Kulwant Singh, deceased,

who had been arrested pursuant to that report, in a case under S. 307/324, I P. C., was actually on bail on the date of the occurrence. According to the prosecution Gurdial Singh (P. W. 7), father of the deceased Kulwant Singh is employed as Works Manager in the Ludhiana Transport Company, which is a private concern and which plies buses on different routes in Ludhiana District. Gurdial Singh is also a share-holder of this Company. The workshop, the office and the taxi stand of this Company are located in Sarai Bansidhar which faces the clock tower. Gurdial Singh, in addition, owns two taxis which he runs on hire. He also owns two private cars which are used both for personal requirements and as taxis. The deceased used to look after these four vehicles. The father and the son used to live together in Model Town. The two taxis used to remain at the Taxi Stand about 100 yards away from the clock tower whereas the other two cars used to be parked at Gurdial Singh's business premises. On August 8, 1968 at about 4.45 p.m. the deceased was sitting on a Takhat posh at the Taxi Stand. It being a Sunday the shops in the neighbourhood were closed. Shersingh (P. W. 9) was standing close to the Takhat posh. Harnak Singh, the driver of one of the taxis and Gurdial Singh were also present. At the taxi stand there was at that time only one taxi belonging to Gurdial Singh. The appellant came from the side of the railway station and fired at the deceased five shots from his pistol. After receiving three shots the deceased dropped down and the remaining two shots hit him when he was lying. The persons present there raised an alarm, shouting 'Don't kill; don't kill'. The appellant, after firing the shots, briskly walked back towards the railway station. The deceased who was bleeding profusely was taken in the taxi by Gurdial Singh, his father and Harnak Singh, the driver, to Dayanand Hospital where they were advised to take the injured to Brown's Hospital because his condition was serious. It is in evidence that some person had telephoned to the City Kotwali, Ludhiana on the day of the occurrence at about 5.30 p.m. informing the police authorities that firing had taken place at Taxi Stand, Ludhiana. The person, giving the information on telephone, did not

disclose his identity; nor did he give any further particulars. When the police officer receiving the telephone message made further enquiries from him he disconnected the telephone. This report was entered in the daily diary at 5.35 p.m. The Assistant Sub-Inspector, Hari Singh, along with Assistant Sub-Inspectors Amrik Singh, Jagat Singh and Brahm Dev and constables Prakash Singh, Harbhajan Singh and Harbans Lal, left the police station in a government jeep for the Taxi Stand, Ludhiana near Jagraon Bus Stand on the Grand Trunk Road, about a furlong and a half away from the City Kotwali Police Station. From there Hari Singh learnt that the injured man had been removed by some persons to Dayanand Hospital. As it was rumoured at the place of the occurrence that the appellant Tapinder Singh had shot at the deceased, Hari Singh deputed Amrik Singh and Brahm Dev to search for him. Hari Singh himself, along with Sub-Inspector Jagat Singh and the police constables left for Dayanand Hospital. From there they went to the Civil Hospital and then they proceeded to C. N. C. Hospital at about 6.30 p.m. On enquiry they were informed that Kulwant Singh had been admitted there as an indoor patient. Hari Singh went upstairs in the Surgical Ward and obtained the report (Ex. PH/13) prepared by Dr. B. Pothan who was in the Surgical Ward where Kulwant Singh was lying. The statement of Kulwant Singh (Ex. PH) was also recorded by him at about 6.50 p.m. in that ward and the same after being read out by him was thumb marked by Kulwant Singh as token of its correctness. That statement was forwarded to the police station, City Kotwali for registration of the case under S 307, I P.C. Exhibit PM was also attested by Dr. Sandhu, House Surgeon. Hari Singh deputed Assistant Sub-Inspector, Jagat Singh to arrange for a Magistrate for recording Kulwant Singh's dying declaration in the hospital. The statement of Gurdial Singh, father of the deceased was also recorded there at about 7.20 p.m. Jagat Singh, A. S. I. brought Shri Sukhdev Singh, P. C. S., Judicial Magistrate, First Class, to the Hospital at about 7.30 p.m. The dying declaration was, however, recorded at about 8.30 p.m. because Kulwant Singh was not found to be in a fit

state of health to make the statement earlier. Kulwant Singh died at the operation theatre the same midnight. Pursuant to Ex PH/13 first information report was registered and the appellant committed to stand his trial for an offence under S. 302, I. P. C.

2. The learned Additional Sessions Judge, believing Gurdial Singh (P. W. 7), Sukhdev Singh, Judicial Magistrate (P. W. 10) and Mukhtiar Singh, H. C. (P. W. 6) held proved the motive for the crime viz. that the appellant suspected illicit intimacy between his wife and the deceased who was married to her elder sister. According to the trial Judge the appellant for this reason bore a grudge against the deceased. The three eye-witnesses, Gurdial Singh (P. W. 7), Harnak Singh (P. W. 8) and Sher Singh (P. W. 9) were held to have given a true and correct account of the occurrence and being witnesses whose presence at the place of occurrence was natural their evidence was considered trustworthy, which fully proved the case against the accused. The dying declaration was also found to be free from infirmity and being categorical and natural the court considered it sufficient by itself to sustain the conviction. The circumstantial evidence, including that of the recovery of blood-stained earth from the place of occurrence, the recovery of blood-stained clothes of the deceased, the fact of the accused having absconded and the recovery of the pistol and cartridges were also held to corroborate the prosecution story. Omission on the part of the prosecution to produce a ballistic expert was considered to be immaterial and it was held not to weaken or cast a doubt on the prosecution case because the oral evidence of eye-witnesses to the commission of the offence impressed the court to be trustworthy and acceptable. The trial court also took into consideration the allegations contained in an application presented by Gurdial Singh (P. W. 7) in the course of the committal proceedings in the court of Shri Mewa Singh Magistrate, on Nov. 20, 1968 to the effect, inter alia, that an attempt was being made on behalf of the accused to tamper with the prosecution witnesses. The trial court convicted the accused under S. 302, I. P. C. and imposed capital sentence.

3. On appeal the High Court rejected the criticism on behalf of the

accused that the occurrence had not taken place at the spot and in the manner, deposed to by the eye-witnesses. On a detailed and exhaustive discussion of the arguments urged before the High Court it came to this conclusion

"... that there was motive on the part of the appellant to commit this crime, that the three eye-witnesses produced by the prosecution are reliable, they were present at the time of the occurrence and have given a correct version of the incident and that the medical evidence fully supports the prosecution and no suspicion is attached to it. The deceased made more than one dying declaration and we are satisfied that they were not induced and that the deceased gave a correct version of the incident. The suggestion made that Tapinder Singh has been roped in on suspicion is not correct because implicit in such an argument is the suggestion that the crime was committed by somebody else. It was broad day light, the assailant must have been identified and consequently we are satisfied that the offence has been fully brought home to the appellant. The place of the occurrence does not admit of any doubt because there is good deal of evidence on the record that blood was recovered from where the Takhat posh was kept by Gurdial Singh and there is no suggestion that the blood was found from anywhere else.

The learned counsel has then urged that the offence does not fall under section 302, Indian Penal Code, but no reasons have been given as to why this is not an offence punishable under section 302, Indian Penal Code.

Learned counsel urged that something must have happened which induced Tapinder Singh to commit this crime. There is nothing on the record, not even a suggestion, that anything happened. Tapinder Singh came armed with a pistol and fired as many as five shots at Kulwant Singh, two of which he fired on his back when Kulwant Singh had fallen on the ground. The appellant, therefore, does not deserve the lesser penalty contemplated by law. Consequently, we uphold the conviction and sentence imposed upon Tapinder Singh. The appeal is dismissed and the sentence of death is confirmed."

4. On appeal in this Court under

Art. 136 of the Constitution, Mr. Nuruddin Ahmed, learned advocate for the appellant, addressed elaborate arguments challenging the conclusions of the courts below on which they have sustained the appellant's conviction. He started with an attack on the F. I. R. based on the dying declaration. According to the counsel, the information in regard to the offence had already been conveyed to the police by means of a telephone message and the police had actually started investigation on the basis of that information. This argument was, however, not seriously persisted in and was countered by the respondents on the authority of the decision in *Sarup Singh v. State of Punjab*, AIR 1964 Punj 508. The telephone message was received by Hari Singh, A. S. I. Police Station, City Kotwali at 5.35 p.m. on September 8, 1969. The person conveying the information did not disclose his identity, nor did he give any other particulars and all that is said to have been conveyed was that firing had taken place at the taxi stand, Ludhiana. This was, of course, recorded in the daily diary of the police station by the police officer responding to the telephone call. But prima facie this cryptic and anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as first information report. The mere fact that this information was the first in point of time does not by itself clothe it with the character of first information report. The question whether or not a particular document constitutes a first information report has, broadly speaking, to be determined on the relevant facts and circumstances of each case. The appellant's submission is that since the police authorities had actually proceeded to the spot pursuant to this information, however exiguous it may appear to the court, the dying declaration is hit by S 162, Cr. P. C. This submission is unacceptable on the short ground that S 162 (2) Cr. P. C. in express terms excludes from its purview statements falling within the provisions of S. 32 (1), Indian Evidence Act. Indisputably the dying declaration before us falls within S 32 (1), Indian Evidence Act and as such it is both relevant and outside the prohibition contained in S 162 (1), Cr. P. C. The counsel next contended that the dying declaration

does not contain a truthful version of the circumstances in which Kulwant Singh had met with his death and, therefore, it should not be acted upon. This argument is founded on the submission that the deceased did not meet with his death at the spot sworn by the prosecution witnesses and that none of those witnesses actually saw the occurrence because they were not present at the place and time where and when the deceased was shot at. We are far from impressed by this contention. The trial court and the High Court have both believed the three eye witnesses and have also relied on the dying declaration. Normally, when the High Court believes the evidence given by the eye witnesses this Court accepts the appraisal of the evidence by that Court and does not examine the evidence afresh for itself unless, as observed by this Court in *Brahmin Ishwarlal Manilal v. State of Gujarat*, Criminal Appeal No. 120 of 1963, D/- 10-8-1965 (SC):

"It is made to appear that justice has failed for reason of some misapprehension or mistake in the reading of the evidence by the High Court." It was added in that judgment:

"There must ordinarily be a substantial error of law or procedure or a gross failure of justice by reason of misapprehension or mistake in reading the evidence or the appeal must involve a question of principle of general importance before this Court will allow the oral evidence to be discussed."

In the present case it was contended that the original document embodying the dying declaration is missing from the judicial record and it is suggested that the mysterious disappearance of this important document during the committal proceedings was intended to remove from the record the evidence which would have shown that this dying declaration could not legally constitute the basis of the F. I. R. and thereby frustrate the plea of the accused that S. 162, Cr. P. C. operated as a bar to its admissibility. The bar created by S. 162 (1), Cr. P. C., as already noticed is inapplicable to dying declarations. But, as the original dying declaration has somehow disappeared from the judicial record and the case is of a serious nature, we undertook to examine the evidence in respect of the dying declaration. The

evidence of Shri Sukhdev Singh, Judicial Magistrate, as P. W. 10, is clear on the point. The witness has repeated in court the statement made to him by Kulwant Singh which was recorded by the witness in Punjab in his own hand. An attempt was made by Mr. Nuruddin to persuade us to hold that Shri Sukhdev Singh's statement is not trustworthy. It was argued that there was no cogent reason for the Magistrate to permit the police officers to make a copy of the dying declaration. This, according to the counsel, shows that the Magistrate acted in a manner subservient to the demands of the police officers and, therefore, his statement should not be taken on its face value. We do not agree. The Magistrate, as observed by the High Court, is quite clear as to what the deceased had told him. He has repeated the same in his statement in court. Exhibit PJ has been proved by him as a correct account of the dying declaration recorded by him. It is not understood how the fact that the Investigating Officer was allowed to make a copy of the dying declaration could go against the Magistrate. The dying declaration could legitimately serve as a guide in further investigation. It was not argued that the dying declaration being a confidential document had to be kept secret from the Investigating Officer. Our attention was drawn by the respondents to the application dated November 20, 1968 (Ex. PZ) filed by Gurdial Singh in the court of Shri Mewa Singh, Magistrate, for expeditious disposal of the commitment proceedings. In that application it was suggested that the defence had got removed the dying declaration and statements under section 164, Cr. P. C. which had presumably been destroyed. According to the respondent's suggestion it was the accused who was interested in the disappearance of the original dying declaration from the record. In this connection we may point out that on October 27, 1968 Shri Mewa Singh, Magistrate, had lodged a report with the police under Ss 379/409/201, I P. C. alleging theft of the F. I. R., the dying declaration and statements of witnesses recorded under Section 164, Cr. P. C. in the case, *State v. Tapinder Singh*. For the disposal of this appeal it is unnecessary for us to express any opinion as to who is responsible for the

disappearance of the dying declaration. That question was the subject matter of a criminal proceeding and we have not been informed about its fate

5. The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under S. 32 (1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances. This Court in *Kushal Rao v. State of Bombay*, 1958 SCR 552 at pp. 568-569 = (AIR 1958 SC 22 at pp. 28-29) laid down the test of reliability of a dying declaration as follows:

"On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in

the form of questions and answers, and; as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control, that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence in order to pass the test of reliability a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case".

This view was approved by a Bench of five Judges in *Harbans Singh v. State of Punjab*, (1962) Supp 1 SCR 104 = (AIR 1962 SC 439). Examining the

evidence in this case in the light of the legal position as settled by this Court we find that the dying declaration was recorded by the Magistrate within four hours of the occurrence. It is clear and concise and sounds convincing. It records:

"Today at 4.45 p.m. my Sandhu (wife's sister's husband) Tapinder Singh fired shots with his pistol at me in the presence of Harnek Singh, Sher Singh and Gurdial Singh at the taxi stand. He suspected that I had illicit relations with his wife Tapinder Singh injured me with these fire shots"

Considering the nature and the number of injuries suffered by the deceased and the natural anxiety of his father and others present at the spot to focus their attention on efforts to save his life we are unable to hold that he had within the short span of time between the occurrence and the making of the dying declaration been tutored to falsely name the appellant as his assailant in place of the real culprit and also to concoct a non-existent motive for the crime. It is unnecessary for us to refer to the earlier declarations contained in Ex. PM, Ex DC and Ex. PH/13 because the one recorded and proved by the Magistrate seems to us to be acceptable and free from infirmity. If the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence it would be open to the court to act upon the dying declaration and convict the appellant stated therein to be the offender. An accusation in a dying declaration comes from the victim himself and if it is worthy of acceptance then in view of its source the Court can safely act upon it. In this case, however, we have also the evidence of eye witnesses Gurdial Singh, (P. W. 7), Harnek Singh (P. W. 8) and Sher Singh (P. W. 9) whose testimony appears to us to be trustworthy and unshaken. No convincing reason has been urged on behalf of the appellant why these three witnesses and particularly the father of the deceased should falsely implicate the appellant substituting him for the real assailant. It is not a case in which, along with the real culprit, someone else, with whom the complainant has some scores to settle, has been added as a co-accused. The only argument advanced on behalf of the appellant was that the deceased was shot at somewhere also and not at

the place where the prosecution witnesses allege he was shot at. It was emphasised that these three witnesses were not present at the place and time where the occurrence actually took place. This submission is, in our view, wholly unfounded and there is absolutely no material in support of it on the existing record. The probabilities are clearly against it. The fact that Hari Singh, A. S. I. (P. W. 2) went to the place of occurrence and from there he learnt from someone that the injured person had been taken to Dayanand Hospital clearly negatives the appellant's suggestion. The fact that the A. S. I. did not remember the name of the person who gave this information would not detract from its truth. On the contrary it appears to us to be perfectly natural for the A. S. I. in those circumstances not to attach much importance to the person who gave him this information. And then, the short duration within which the injured person reached the hospital also shows that those who carried him to the hospital were close-by at the time of the occurrence and the suggestion that Gurdial Singh (P. W. 7), Harnek Singh (P. W. 8) and Sher Singh (P. W. 9) must have been informed by someone after the occurrence does not seem to us to fit in with the rest of the picture. We are, therefore, unable to accept the appellant's suggestion that the deceased was shot at somewhere else away from the place of the occurrence as deposed by the eye witnesses.

6. Some minor points were also sought to be raised by Mr. Nuruddin. He said that the pair of shoes belonging to the deceased were left at the spot but they have not been traced. The takhat posh on which the deceased was sitting has also not been proved to bear the marks of blood nor are the blood marks proved on the seats of the car in which the deceased was taken to the hospital. The counsel also tried to make a point out of the omission by the prosecution to prove blood stains on the clothes of Gurdial Singh (P. W. 7), and Harnek Singh (P. W. 8) who had carried Kulwant Singh from the place of the occurrence to the hospital. Omission to produce a ballistic expert was also adversely criticised. These according to the counsel, are serious infirmities and these omissions militate against the prosecution story. In our opinion, the criticism of the counsel

assuming to be legitimate, which we do not hold, relates to matters which are both insignificant and immaterial on the facts and circumstances of this case. They do not in any way affect the truth of the main elements of the prosecution story. On appeal under Art. 136 of the Constitution we do not think it is open to this Court to allow such minor points to be raised for the purpose of showing defects in appraisal of the evidence by the High Court and for evaluating the evidence for ourselves so as to arrive at conclusions different from those of the High Court. The eye witnesses having been believed, those points lose all importance and cannot be pressed in this Court.

7. Considerable stress was laid on behalf of the appellant on the submission that according to the folder Ex. DC one Trilochan Singh was present in the hospital as a friend or relation of the injured person. From this it was sought to be inferred that Gurdial Singh, father of Kulwant Singh, had not accompanied his son to the hospital and that this would show that the eye witnesses are not telling the truth. The argument seems to us to be without any basis and is misconceived. In the first instance the name of Trilochan Singh on the folder has not been proved. It is the contents of Ex. DC which have been proved by Dr. E. Potahan (P. W. 1 at the trial) who had appeared as P. W. 10 in the Court of the Committing Magistrate. Secondly in this document as we have verified from the original record Gurdial Singh is actually mentioned as the father of the injured person. We are, therefore, not impressed by the submission that Ex. DC goes against the testimony of the eye witnesses. Incidentally, Ex. DC also contains the precise information which was the subject matter of the dying declaration. It appears that in order to discredit Ex. DC with respect to the information about the appellant being the assailant, the name of one Trilochan Singh (whose identity still remains unknown) was somehow made to appear on the folder but as it has not been legally proved and not referred to by any witness we need say nothing more about it. This argument thus also fails. The submission that the medical evidence contradicts the version given by eye witnesses also remains unsubstantiated on the record.

8. As a last resort it was contended

that if the motive alleged by the prosecution is accepted, then the sentence imposed would appear to be excessive. In our view, the manner in which the five shots were fired at the deceased clearly shows that the offence committed was deliberate and pre-planned. We are unable to find any cogent ground for interference with the sentence. The appeal accordingly fails and is dismissed.

Appeal dismissed

1970 CRI. L. J. 1422 (Vol. 76, C. N. 375) =
AIR 1970 SUPREME COURT 1619 (V 57 C 344)

(From: Madhya Pradesh)*

J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

Harnath Singh, Appellant v. The State of Madhya Pradesh, Respondent.

Criminal Appeal No. 130 of 1966, D/- 27-9-1968.

(A) Criminal P. C. (1898), S. 164 — Power to record statements and confessions — Magistrate conducting identification proceedings — Duty of.

A Magistrate when called upon to conduct identification proceedings should confine his attention only to the steps to be taken to ensure that the witnesses were able to identify certain persons alleged to have been concerned in the commission of the crime. If the Magistrate transgresses this limit and records other statements which may have a bearing in establishing the guilt of the accused this must be done strictly in accordance with the provisions of Section 164.

Where a Magistrate having only third class powers recorded statements of identifying witnesses in support of the identification of the accused and also recorded what the witness had said after identifying particular accused this statement would be inadmissible as being in contravention of Section 164 but this would not apply to the record by him to the effect that the witnesses correctly identified the accused. AIR 1961 SC 1527 Rel. on

(Paras 13, 14)

(B) Evidence Act (1872), S. 9 — Identification parades — Reasons for

* (Criminal Appeal No. 55 of 1964, D/- 24-4-1965—Madh Pra)

CN/DN/B307/70/DHZ/D

and scope of — Stated. AIR 1955 SC 104 Rel. on. (Para 9)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 1527 (V 48) =

(1962) 1 SCR 662 = 1961 (2)

Cri LJ 705, Deep Chand v.

State of Rajasthan 12, 13

(1955) AIR 1955 SC 104 (V 42) =

1955-1 SCR 903 = 1955 Cri

LJ 196, Ramkrishan Mithan-

lal Sharma v. State of Bombay 9

(1936) AIR 1936 PC 253 (2)

(V 23) = 37 Cri LJ 897, Nazir

Ahmad v. King Emperor 9, 11, 12

(1918) AIR 1918 Cal 88 (V 5) =

ILR 45 Cal 557 = 19 Cri LJ

305, Amiruddin Ahmed v.

Emperor 12

Mr. R. L. Kohli, Advocate, for Appellant; Mr. I. N. Shroff, Advocate, for Respondent.

The following Judgment of the Court was delivered by

MITTER, J. — This is an appeal by Special Leave from the judgment and order of the Madhya Pradesh High Court, Gwalior Bench on April 24, 1965 in Criminal Appeal No. 55 of 1964. The said appeal was heard and disposed of along with two other appeals Nos. 44 and 45 of 1964. The appellant before us, Harnath Singh was the appellant in Appeal No. 55 of 1964 while Narayan Singh and Chhotelal were the appellants in the other two appeals. Narayan Singh and Harnath Singh were convicted by the Additional Sessions Judge, Morena, under Section 395 of the Indian Penal Code while Chhotelal was convicted in the same trial under Section 395 read with S. 75 of the Indian Penal Code.

2. The prosecution case was as follows. There was a dacoity at the house of one Dhudilal in village Chhota Khada on the night of December 10, 1962 in which the inmates of the house were beaten and property, to wit, Rs. 350 in currency notes, some silver ornaments etc, belonging to one Raghunath were taken away by the dacoits from the said house. Ramkumar (P. W. 1) raised an alarm which brought the neighbours on the scene and one of the dacoits, Chhotelal, was caught on the spot and handed over to the Police. The first information report was lodged by Dhudilal at about 9 a.m. on the following morning. During investigation Rs. 335 in currency notes be-

sides some silver articles and small change were found on the person of Chhotelal. Some articles were also produced by Narayan Singh on December 12, 1962. On the same day, on a personal search of the appellant, Harnath Singh, four George V Silver rupee coins one Victoria silver rupee coin, one silver half-rupee coin and one old square coin with vermillion on them were found and seized. On December 25, 1962 there were test identification parades of the accused and all the appellants were identified by some of the eye-witnesses. The appellant, Harnath Singh, was identified by Ramkumar (P. W. 1), Panabai (P. W. 13), and Hari Shankar (P. W. 15). The Articles seized from the accused were also identified. Chhotelal admitted his presence in the village on the night of the incident and the seizure of Rs 335 from his person but claimed them as his own. He denied the seizure of the other articles from his possession. Narayan Singh denied the recovery of any articles from his house while the appellant, Harnath Singh, admitted the seizure of five rupee coins and the square coin from his person but claimed them as his own.

3. The Sessions Judge found all the accused guilty and sentenced them as stated.

4. So far as the appellant Harnath Singh is concerned, the High Court held that he had been "identified as one of the dacoits by Ramkumar (P. W. 1), Panabai (P. W. 13) and Hari Shankar (P. W. 15)" and they had also "identified him earlier in a test identification parade." Discussing the question as to whether the evidence with regard to the test identification parade was admissible in view of the fact that it was conducted by a Magistrate of the Third class who was not empowered to record statements under Section 164 of the Criminal Procedure Code, the High Court was of the view that.

"the test identification parade..... cannot be disregarded as of no value under the circumstances of the case."

5. The High Court then went on to consider the evidence against the appellant as to his being concerned in the dacoity. It relied on the testimony of Ramkumar, P. W. 1, that the appellant was standing near his sister, Tulsabai and had a Gajkundi and was

ing crackers. Ramkumar had also given a description of the appellant to the Police and stated in his evidence that he was able to identify him from his facial features. Panabai, another of the identifying witnesses, had stated that the appellant was wearing a black coat and was flashing a torch. The third identifying witness, Hari Shankar, could give no special reason for identifying the appellant but stated that he was standing near his aunt, Tulsabai. All these witnesses stated that they had identified the appellant in the identification parade. Tulsabai did not identify the appellant but had stated that the person standing near her had a black coat on. The High Court held on the evidence that there was no sufficient reason to discard the testimony of those persons on the point of their identifying the appellant as one of the dacoits although there were some minor discrepancies in their statements. The High Court also found that the evidence of the witnesses was amply corroborated from other evidence on record.

6. One of the circumstances which corroborated the testimony of the witnesses, according to the High Court, was the unexplained possession of the appellant of some of the articles taken away by the dacoits from the scene after the incident. In the first information report there had been specific mention of the loss of four George V rupee coins, one Victoria rupee coin and a gilt half rupee piece. These correspond with the recovery from the appellant along with one square coin probably of brass all bearing marks of vermillion. This mark was explained by Raghunath, the claimant of the coins as having been used in the Diwali pooja. The High Court did not accept the appellant's version of his having carried them on his person because they used to be worshipped by his father and grandfather. The High Court held that the presence of the square piece in his possession showed his complicity in the offence. According to Raghunath this coin was kept separately from the other coins but all bore vermillion mark because of their use in the pooja.

7. The second circumstance incriminating the appellant as found by the High Court was his unexplained absence from duty in the Chambal

Canal Project from December 9, 1962. While the appellant admitted his absence from duty he tried to account for it by saying that he was ill but offered no independent witness to establish his statement. Accordingly, the High Court found itself unable to disturb the conviction of the appellant under Section 395 and dismissed the appeal.

8. Before us learned counsel for the appellant contended that the conviction of the appellant could not stand in view of the reliance of the High Court on the record of the test identification parade. In our opinion, the learned Judges of the High Court did not affirm the conviction relying merely or mainly on the said report. The elaborate discussion on this point appears to have been prompted by the two judgments in Appeal No. 218/1963 and Appeal No 35/1964 of the same High Court on which reliance was placed by counsel for the accused. As noted already, the view of the High Court was that the test identification parade could not be discarded as of no value in the circumstances of the case. It was only after recording the said view that the High Court proceeded to consider the evidence of the witnesses and the circumstances which corroborated their testimony. These were only two as discussed above. It appears therefore that although the High Court did not reject the testimony of the Naib Tehsildar, Dinkar Rao who presided at the parade, it really upheld the conviction of the appellant on other evidence on the record.

9. Relying principally on the judgment of the Judicial Committee of the Privy Council in *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2) and on certain observations of this Court in *Ramkrishan Mithanlal Sharma v State of Bombay*, 1955-1 SCR 903 = (AIR 1955 SC 104) counsel for the appellant attacked the identification proceedings as being without jurisdiction and as such inadmissible in evidence. It was further argued that if the High Court had rejected the said evidence, it would not have maintained the conviction of the appellant. In order to appreciate the foundation for this argument, it is necessary to take a brief note of the reason for holding identification proceedings and the scope thereof. During

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A Heart-felt Appreciation of A. I. R.
from a Retired High Court Judge,
and Subscriber for nearly 50 Years.

I may avail myself of this opportunity to express my appreciation of the service that your Journal has been rendering to the profession. I started subscribing to it in 1924 when I was practising in the District Courts at Jullunder (Punjab). I continued to subscribe to it when I shifted to Lahore for practice in the High Court. I suspended subscribing to it for a period of well-nigh five years on my appointment as a Judge of the High Court of the Punjab because I could then get it at Government cost. However on resuming practice in the Supreme Court after my retirement, I had not only to resume subscribing to it but also to buy the Volumes for the intervening years. During the period of well-nigh fifty years that I was subscribing to it, I always found the reporting to be careful and up-to-date. I was particularly impressed with the care and precision with which the headnotes were, by and large, prepared.

In the end, let me both thank and congratulate the management and the editorial staff for the service they have been rendering to the profession since its inception. During this period, many mushroom Law periodicals started publication, but like mushrooms they disappeared.

It is in the fitness of things to be enabled to give expression to my feelings on the termination of a connection extending well-nigh over half-a-century.

Sd/- Achhru Ram
(Retired Judge,
High Court of Punjab
and Senior Advocate,
Supreme Court of India.)

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—S. 488—Order for maintenance of children — Grounds — Minority of children is not the only circumstance to grant maintenance under section

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—S. 488 — Order for maintenance — Proceedings are not in nature of criminal proceedings—They are civil proceedings dealt with summarily in criminal Court on grounds of convenience and social order

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—S. 562 (1-A) — Accused first offender; interest of justice would be served by admonishing him under S. 3 (1) of Act 20 of 1958—See Penal Code (1860), S. 332

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EVIDENCE ACT (1 of 1872)

—Ss. 3, 30 — Confessional statement of co-accused—Evidentiary value of—Not a substantive evidence under S. 3 — Can be treated as evidence in a general way under S. 30

Raj 1206C (C N 303)

—S. 30 — Confessional statement of co-accused — Evidentiary value of — Not a substantive evidence under S. 3 of the Evidence Act—Can be treated as evidence in general way under S. 30 — See Evidence Act (1872), S. 3

Raj 1206C (C N 303)

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—Ss. 91, 92 — Execution of sale-deed—Allegation of collateral agreement between the parties that the deed will be nominal and will not be acted upon — Agreement not hit by Ss. 91 and 92 and can be proved — Both direct and circumstantial evidence can be considered in support of the alleged agreement

Madh Pra 1176C (C N 291)

—S. 92 — Execution of sale-deed — Allegation of collateral agreement between the parties that the deed will be nominal and will not be acted upon — Agreement not hit by Ss. 91 & 92 and can be proved — Both direct and circumstantial evidence can be considered in support of the alleged agreement—See Evidence Act (1872), S. 91

Madh Pra 1176C (C N 291)

—Ss. 101 to 104 — Sale of house — Receipt of full consideration admitted by owner in sale deed — Plea of non-receipt of consideration — Burden is on the owner to explain the admission in the sale deed and prove non-receipt of consideration

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—S. 114, Illus. (b) — Accomplice evidence — Corroboration of—See Evidence Act (1872), S. 133

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—S. 115 — Exemption from holding inquiry and giving opportunity under Article 311 (2) — Government not estopped from claiming such exemption even after inquiry — See Constitution of India, Article 311 (2) and Proviso (a)

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—S. 124 — Official communications — Privilege — Extent

S C 1266D (C N 325)

—Ss. 133, 114 Illus. (b) — Evidence of approver and accomplice — Necessity of corroboration — Nature of corroboration required

S C 1158 (C N 286)

—Ss. 133, 114 — Evidence of approver — Dependability — Tests to be satisfied — Conviction on his testimony alone — Not safe under S. 114 of the Act

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—Ss. 20 (2), 26 (h), 20-A (as inserted by Orissa Act 11 of 1954) — Recognition of certain area as forest land under S. 20-A — Accused committing offence punishable under S. 26 (h), within such area — His conviction is not illegal for want of notification under S. 20 (2)

Orissa 1193 (C N 297)

—S. 20-A (as inserted by Orissa Act, 11 of 1954) — Recognition of certain area as forest land under S. 20A — Accused committing offence punishable under S. 26 (h), within such area — His conviction is not illegal for want of notification under S. 20 (2) — See Forest Act (1927), S. 20 (2)

Orissa 1193 (C N 297)

—S. 26 (h) — Recognition of certain area as forest land under S. 20A — Accused committing offence punishable under S. 26 (h), within such area — His conviction is not illegal for want of notification under S. 20 (2)—See Forest Act (1927), S. 20 (2)

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—S. 2 (1) or (c) — 'Forward contract' — Court has to consider real nature of transactions and real intention of parties at the date of transactions

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—S. 2 (1) — 'Ready delivery contract' — Merely because the word 'delivery' is written in some of the entries with a date, the contracts cannot become ready delivery contracts

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—S. 22-A — Power to search and seize books of accounts or other documents — Section does not debar police from exercising powers under S. 165, Criminal P. C.—AIR 1968 All 338, Diss. from

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MADRAS PADDY AND RICE DEALERS (LICENSING AND REGULATION) ORDER (1965)

—Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965

Mad 1236C (C N 311)

MADRAS PADDY AND RICE DEALERS (LICENSING AND REGULATION) ORDER (1966)

—Validity—Order is invalid since State Government had not formed opinion that it was necessary and expedient for purposes mentioned in S. 3 (1), Essential Commodities Act

Mad 1232B (C N 309)

MADRAS PADDY AND RICE (DECLARATION AND REQUISITIONING OF STOCKS) ORDER (1964)

—Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965

Mad 1236D (C N 311)

—Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965

Mad 1236E (C N 311)

MADRAS PADDY AND RICE (MOVEMENT CONTROL) ORDER (1964)

—Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965

Mad 1236B (C N 311)

MADRAS PADDY AND RICE (MOVEMENT CONTROL) ORDER (1965)

—Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965

Mad 1236A (C N 311)

MADRAS PADDY AND RICE (MOVEMENT CONTROL) ORDER (1966)

—Validity — Order is invalid because before passing it the State Government had not formed an opinion that it was necessary and expedient for purposes mentioned in S. 3 (1), Essential Commodities Act

Mad 1232A (C N 309)

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—S. 95—Even intentional causing of harm is excused because of its triviality—Word "harm" includes injury to mind, body or property—(Words and Phrases—"Harm")
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—S. 292—Obscene books etc.—Obscenity—Determination—Aspects to be considered by Court—Criminal Appeal No. 805 of 1965, D/- 25-10-1966 (Bom), on facts, Reversed
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Pat 1245B (C N 315)

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Orissa 1196A (C N 299)

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Orissa 1196B (C N 299)

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—S. 324—Deceased 50 years' old—Accused striking deceased with thenga on vital part of body—Conviction under S. 304, Part II correct—See Penal Code (1860), S. 304, Part II
Orissa 1196A (C N 299)

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—S. 15 (1) and (2) — Search — Non-compliance with sub ss. (1) and (2) — It is mere irregularity — Trial is not vitiated unless it is shown that prejudice is caused by non-compliance — AIR 1965 Andh-Pra 176, Overruled, (1968) 9 Guj L R 278, Affirmed — SC 1279B (C N 328)

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SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN 1970 CRI. L. J. SEPTEMBER

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; Revers.=Reversed in.

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- S. 165—AIR 1968 All 338 — DISS. 1970 Cri L J 1216C (C N 305) (Bom).
- S. 369—AIR 1965 Assam 9—DISS. 1970 Cri L J 1254B (C N 321) (Orissa).
- S. 403—('66) Cri. Revn. Applns. Nos. 410 and 413 of 1964, D/- 3.6.1966 (All) — REVERS, 1970 Cri L J 1270 (C N 320) (SC).

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- S. 441—('51) 1951 All L J 461—DISS. 1970 Cri L J 1199C (C N 300) (Pat).
- S. 442—('51) 1951 All L J 461 — DISS. 1970 Cri L J 1199C (C N 300) (Pat).

SUPPRESSION OF IMMORAL TRAFFIC IN WOMEN AND GIRLS ACT (104 of 1946)

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COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC., IN 1970 CRI. L. J. SEPTEMBER

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; REVERS =Reversed in.

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- ('51) 1951 All L J 461, Hiralal v. State — DISS. 1970 Cri L J 1199C (C N 300) (Pat).
- ('66) Cri. Revn Applns. Nos. 410 and 413 of 1964, D/- 3.6.1966 (All) — REVERS. 1970 Cri L J 1270 (C N 320) (S C).

AIR 1968 All 338=1965 Cri L J 1325, Bullion and Agricultural Produce Exchange Pvt. Ltd. v. Forward Markets Commission — DISS. 1970 Cri L J 1216B, C (C N 305) (Bom).

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Assam

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TELEGRAMS : "EXPERT, NAGPUR"

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Asst. Examiner deputed to photograph documents when required. IN URGENT MATTERS Mr. BHANAGAY can examine documents in court and give evidence on the following day. Questions for cross-examination or notes for arguments with relevant extracts of authorities can be supplied.

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7. Now, facts which establish the identity of an accused person are relevant under Section 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in Court. Identification proceedings in their legal effect amount simply to this, that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162, Criminal Procedure Code. It is for this reason that the identification parades in this case seem to have been held under the supervision of a Magistrate. Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must, therefore, take intelligent in-

terest in the proceedings, bearing in mind two considerations: (i) that the life and liberty of an accused may depend on their vigilance and caution, and (ii) that justice should be done in the identification. Those proceedings should not make it impossible for the identifiers who, after all, have, as a rule, only fleeting glimpses of the person they are supposed to identify. Generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the Court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify, it may be kept in view, varies according to the power of observation and memory of the person identifying and each case depends on its own facts, but there are two factors which seem to be of basic importance in the evaluation of identification. The persons required to identify an accused should have had no opportunity of seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny by the Court. Shri Pratap Singh, Magistrate, who conducted the identification, has appeared at the trial as P. W. 20. The identification memo in respect of Naubat, appellant, is Ex. Ka 20 dated October 21, 1967 and in respect of Budhsen is Ex. Ka 21, dated October 28, 1967.

8. In Ex. Ka 20 we find a note that Naubat had stated that he had been shown to the witnesses and had also been photographed. Column 7 of the memo requires to be inserted therein the name or description of the person the witness came to identify and this is to be recorded in the words of the witnesses. In Ex. Ka 20, Inderjit said:

"I saw the accused while committing the murder. I did not know him before." As against the other five witnesses namely Kanwar Sen, Ghaziuddin, Imam Baksh, Chandrapal and Ranchor we only find the word "Do". In this connection the note at the foot of the printed form contain-

ing the following direction seems to us to be of some importance:

"N. B.— It is very useful to note whether the witness knew the name of the person he had come to identify or he only described him in some such way as the man who was standing at the door at the time of the dacoity. The witness is not to be asked in a general way, identify whomsoever you know."

It is obvious that scant attention was paid to the letter and spirit of this note. Shri Pratap Singh (P. W. 20) when cross-examined on behalf of Naubat said.

"I asked the witnesses who had come to identify accused Naubat as to what they had seen Naubat doing. Whatever they told me was recorded by me in col. 7 of the memo. Whatever the first witness Inderjit Singh told was recorded word for word by me and since the other witnesses repeated the same thing I noted down the word 'as above' (uparyukt)".

The remarks of the Magistrate were also required against the enquiry on point No. 2 at the bottom of the first sheet of Ex. Ka 20 which relates to the step taken by the jail authorities to ensure the proper conduct of the proceedings. We do not find any remarks by the Magistrate on this point in Ex. Ka 20. His remarks would certainly have provided helpful information on an important point without which the Court is left only to guess.

9. In the identification memo in respect of Budhsen (Ex. Ka 21) in column 7, against the name of Inderjit, witness, we find the following entry:

"I came to identify the person who committed the murder of my brother". Against the name of Iman Baksh we find the following entry

"Came to identify the person who committed the murder".

Against the names of the remaining four witnesses, who were the same as mentioned in Ex. Ka 20, we find the word "Do". This means that their answer is the same as that of Iman Baksh. In this form also there are no remarks by the Magistrate in respect of the steps taken by the jail authorities to ensure proper conduct of proceedings. The memos of the identification parades do not show that the parades were held by the Magistrate with the degree of vigilance, care and anxiety their importance demanded. The casual manner of filling the identification memos is further apparent from the fact that Budhsen, appellant's admis-

sion into the jail is shown therein as October 15, 1967 instead of October 14, 1967. This mistake was admitted by P. W. 20 in cross-examination without offering any explanation for the mistake.

10. We may here appropriately point out that Shri Pratap Singh (P. W. 20) was called upon as a Magistrate only to conduct the identification proceedings and it was beyond his duty to interrogate the witnesses for eliciting other facts or to require them to make any statement beyond mere identification.

11. This takes us to the evidence of the identifying witnesses. Imam Baksh was not produced at the trial. The other witnesses, except three, were not relied upon by the High Court. We need, therefore, confine ourselves only to those three witnesses.

12. Inderjit (P. W. 1) brother of Hazarilal, deceased, deposed at the trial that on September 12, 1967 at 10 a.m. he, Kanwar Sen and Hazarilal were sitting in the Gher, about 50 paces towards the east of the village Babadi. Hazarilal was sitting on a cot and Kanwar Sen and the witness were sitting on a heap of fodder nearby in the Duari because that was the only place affording shelter against rain. The cot on which Hazarilal was sitting was in the middle of the Duari. What the witness next stated may now be reproduced in his own words:

"Four unknown persons entered the Duari from outside. One of them sat down by the headside of my brother and another proceeded towards the charpoy of my brother. Of the remaining two, one caught hold of me, while the other caught hold of Kunwar Sen. Kunwar Sen and I immediately raised an alarm. The person, who proceeded towards the charpoy of my brother, took out a country made pistol from the bag and shot at my brother. It was he who was holding the bag in his hand. The shot hit my brother and he jumped from the charpoy and fell down. The person who was sitting by the headside of my brother pressed my brother's legs with his legs. The person, armed with the pistol, again loaded the pistol and shot at my brother's chest. My brother died immediately."

On hearing my shouts and the sound of pistol firing Ram Singh, Iman Khan and Ranchor arrived. The Badmashes escaped through the Duari and ran away towards the east."

It is noteworthy that this witness has not specifically stated that Naubat, appellant,

had fired the pistol shot. It is only by reference to the person holding a bag from which the pistol was taken out that it is sought to be implied that Naubat had fired the shot. In Court Naubat was not specifically identified as the person firing the shot or even as a person holding the bag. The witness has also not stated as to what part the other appellant played in the occurrence. A little lower down the witness proceeds:

"I never saw before the four persons who had come to my brother's gher on the day of occurrence. I had come to the District Jail, Aligarh to identify them. (The witness, having touched the accused Naubat and Budhsen, stated) I identified them in jail. I saw them for the first time on the day of occurrence and thereafter I saw them in jail at the time of identification. I did not see them anywhere in the intervening period.

The question naturally arises if on this state of his testimony the identification made by Inderjit can be held to be a reliable piece of evidence on which the conviction of the appellants can be sustained. In evaluating his testimony we may appropriately consider how far his description of the actual occurrence inspires confidence. We are asked to believe that one of the four assailants sat down near the head of Hazarilal and pressed the legs of the latter with his own legs and he and the deceased were in this position when one of the assailants fired at Hazarilal, who thereupon jumped down from the cot. When we picture to ourselves the occurrence as narrated we find it to be unrealistic and, therefore, untrustworthy, if not fantastic. There is undoubtedly considerable embellishment in the Court version as compared to what was stated by the witness in the F. I. R. This embellishment does not add to the credibility of the story but it certainly suggests that the witness has a highly imaginative mind and is capable of playing on his imagination. We, therefore, do not consider it to be safe to hold on his evidence that the two appellants were among the assailants and that Naubat had fired the fatal shots. Kanwar Sen (P. W. 3) deposed that on the day of the occurrence he was sitting in the Nohra of Hazarilal who was sitting on a cot. He and Inderjit were sitting on the fodder because it was drizzling. The statement in regard to the occurrence may now be described in his own words:

"Four unknown persons came, one of

whom had a red jhola. One of them sat down on headside of Hazarilal and another proceeded ahead. The remaining two caught hold of me and Inderjit. Inderjit and I raised an alarm. The person having the red Jhola took out a pistol from the Jhola and fired at Hazarilal. On being hit with the shot, Hazarilal fell down. The badmash, who was sitting on the headside of Hazarilal, pressed his legs with his legs. Having loaded the pistol, the person armed with pistol, fired a shot at Hazarilal. Hazarilal died. Ram Singh, Ranchor and Imam Khan arrived at the spot. The badmashes went away through the eastern side.

I did not know all the four badmashes from before. (Having touched Budh and Naubat, the witness stated) I identified them in jail. I saw these two accused at the spot for the first time and thereafter in jail. I did not see them anywhere in the intervening period."

In cross-examination the witness admitted that the assailants had been seen by him only for about three or four minutes. He had gone to the jail for identification on three occasions. On two occasions he identified the accused persons in separate parades but did not identify anyone on his third visit. The third visit deposed by him seems to us to be a somewhat suspicious circumstance and the prosecution has not cared even to attempt to explain this statement. The witness was also unable to state as to which accused had been identified by him in the first parade and which in the second. He was further unable to tell the dates on which he had gone to the jail for identification. According to him he had gone to the jail at about 11 or 12 O'Clock during the day time.

13. These two witnesses claimed to have seen the actual occurrence which took three or four minutes. Two assailants held these two witnesses and one sat on the cot of the deceased and pressed the legs of the deceased with his own legs and the fourth one fired two shots having re-loaded the pistol after the first shot. Their glimpses of the assailants would of course be somewhat fleeting but the different parts played by the four assailants would certainly have left on their minds a fairly firm impression as to what part the two appellants had played in that sordid drama. The power to identify varies according to the power of observation and memory of the identifier and an observation may be based upon

small minutiae which a witness, especially a rustic, uneducated villager may not be able to describe or explain. In this case we find that P. W. 4 Ranchor does not know the difference between a minute and a second. An illiterate villager may also at times be found to be more observant than an educated man and his identification in a given case may impress the Court without the witness being able to formulate his reasons for the identification. But on the peculiar facts and circumstances of this case one would expect these two witnesses to state what particular part those two appellants played in the course of the occurrence. Without some clear indication to that effect it would be difficult for a judicial mind to rely for conviction on the general assertion of these witnesses that the appellants were among the assailants who murdered the deceased. Ranchor (P. W. 4) gave his version as follows:

"It happened 13 1/4 months ago. It was 10 a.m. I had gone to the shop of Ganu Lal Patwari to make purchases. Ram Singh Darzi, was present at that shop along with me. I heard an alarm from the eastern side in which direction lay the Nohra of Hazarilal. I heard the sound of a fire. Ram Singh and I rushed towards the Nohra. When both of us were at a distance of 15 paces from the Nohra, I heard the sound of another fire. I saw four unknown badmashes coming out of the Nohra of Hazarilal. They ran away towards the east. Three badmashes were empty handed and one of the badmashes had a katta in his right hand and a red jhola in his left hand. I went to the Nohra and saw that Hazarilal was lying dead and Indejit and Kanwar Sen were present there. Iman Khan also reached the Nohra of Hazarilal after me.

I had gone to the District Jail in order to identify the badmashes (having touched the accused Naubat and Budhsen, the witness stated) I identified them in the District Jail. At first I saw them running away from the Nohra. Thereafter, I identified them in the District Jail. I never saw them in the intervening period (Having touched Naubat, accused, the witness stated) He had a Katta in his right hand and a jhola in his left hand."

In cross-examination he stated that he had gone to the District Jail, Aligarh twice for identification. In the first identification he identified the person who had a jhola in his hand and at the second identification he recognised the other, Budhsen,

He also stated that before identification proceedings, the Deputy Sahib had enquired from him as to whom he had come to identify to which he had replied that he had come to identify the persons who had committed the murder of Hazarilal. This witness only saw the assailants when they were running away after the alleged murder. Normally speaking, therefore, his would be a still more fleeting glimpse of the assailants as compared to that of the two earlier witnesses. To sustain the conviction on his evidence as to identification one would certainly expect a more firm and positive reference to the appellant, who was holding a jhola and a pistol (katta), during the identification parade. Without such corroborative evidence the statement in Court identifying Naubat, appellant, would be of little value.

14. This is not all. The statements of these three witnesses are otherwise also unimpressive and coupled with the fact that the possibility of these persons having seen at least Budhsen on October 21, 1967, outside the jail gates whom they are supposed to have identified a week later the test identification parades cannot be considered to provide safe and trustworthy evidence on which the appellant's conviction has been sustained by the High Court.

15. Shri O. P. Rana on behalf of the State very strongly argued that under Article 136 of the Constitution this Court does not interfere with the conclusions of facts arrived at on appreciation of evidence and in this case on consideration of the evidence relating to the test identification parades two Courts below have come to a positive conclusion that the appellants were two out of the four unknown assailants of Hazarilal, deceased. This Court, so argued the counsel, should affirm that conclusion in the absence of any proved legal infirmity. In regard to the sentence the counsel contended that this is a matter which rests in the discretion of the trial court and when the sentence of death is confirmed by the High Court this Court should not interfere on appeal under Article 136.

16. It is undoubtedly true that under Article 136 this Court does not ordinarily interfere with conclusions of fact properly arrived at by the High Court on appreciation of evidence on the record, except where there is legal error or some disregard of the forms of legal process or a violation of the principles of natural justice resulting in grave or substantial

injustice. In *Tej Narain v. State of U. P.*, Criminal Appeals Nos. 81, 112 and 132 of 1964, D/- 23-10-1964 (SC) this Court, after examining its previous decisions in which this Court had not accepted concurrent findings or had re-examined the evidence for itself, said:

"The above cases show that this Court has not accepted concurrent findings of fact if there is no evidence for the finding or if there has been an omission to notice material points while appreciating evidence or to bear in mind relevant considerations which swing the balance in favour of the accused. It has also on occasions re-examined the evidence in view of the fact that the case against the accused was based on circumstantial evidence and it was of an extraordinary nature. In the case before us, as we will show presently the High Court appears to have completely overlooked the variation in certain important aspects by P. W. 3, while deposing at the trial from what he had stated earlier and consequently the High Court could not apply its mind to their significance. In view of this infirmity in the judgment and other considerations which will be pointed out later we are satisfied that this is one of the exceptional cases in which we should undertake the examination of the entire evidence and appraise it."

In this case the following observations of Hidayatullah J., (as the present Chief Justice then was) from the judgment in *Anant Chintaman Lagu v. State of Bombay*, (1960) 2 SCR 460 = (AIR 1960 SC 500) were reproduced with approval:

"Ordinarily, it is not the practice of this Court to re-examine the findings of fact reached by the High Court particularly in a case where there is concurrence of opinion between the two Courts below. But the case against the appellant is entirely based on circumstantial evidence, and there is no direct evidence that he administered a poison, and no poison has, in fact, been detected by the doctor, who performed the post-mortem examination, or by the Chemical Analyser. The inference of guilt having been drawn on an examination of a mass of evidence during which subsidiary findings were given by the two Courts below, we have felt it necessary, in view of the extraordinary nature of this case, to satisfy ourselves whether such conclusion on the separate aspects of the case, is supported by evidence and is just and proper. Ordinarily, this Court is not required to enter

into an elaborate examination of the evidence, but we have departed from this rule in this particular case, in view of the variety of arguments that were addressed to us and the evidence of conduct which the appellant has sought to explain away on hypotheses suggesting innocence. These arguments, as we have stated in brief, covered both the factual as well as the medical aspects of the case, and have necessitated a close examination of the evidence once again, so that we may be in a position to say what are the facts found, on which our decision is rested."

In *Mahabub Beg v. State of Maharashtra*, Criminal Appeal No. 120 of 1964, D/- 19-3-1965 (SC) this Court observed:

"We have been taken through the entire evidence of all the important witnesses by counsel for the appellants and we do not think that the conclusion recorded by the Sessions Judge and confirmed by the High Court was one which could not reasonably be arrived at, by those Courts. There are undoubtedly certain discrepancies in the statements of the four witnesses, Anna, Kisan, Sahebrao and Sukhdeo. But what weight should be attached to the evidence of the witnesses was essentially a matter with which the Court of first instance, before whom the witnesses were examined was concerned, and if the view taken by that Court is confirmed by the High Court, even assuming that this Court may, if the case were tried before it, have taken a different view, (though we do not say that in this case we would have so done) we would not be justified in making a departure from the settled practice of this Court and proceed to review the evidence."

In *Brahmin Ishwar Lal Manilal v. State of Gujarat*, Criminal Appeal No. 129 of 1963, D/- 10-8-1965 (SC) this Court stated the position thus:

"We have dealt with the arguments of Mr. Shroff at some length but we wish to restate that this Court will not examine for itself evidence led in a criminal case unless it is made to appear that justice has failed by reason of some misapprehension or mistake in the reading of the evidence by the High Court. The High Court must be regarded as the final court in criminal jurisdiction and special leave given in a criminal case does not entitle the person to whom the leave is given to canvass the correctness of the findings by having the evidence read and

reappraised. There must ordinarily be a substantial error of law or procedure or a gross failure of justice by reason of misapprehension or mistake in reading the evidence or the appeal must involve a question of principle of general importance before this Court will allow the oral evidence to be discussed."

17. In *G. V. Subbrayanam v. State of Andhra Pradesh*, (1970) 1 SCC 235 = (AIR 1970 SC 1079) this Court appraised the evidence on the plea of self-defence and allowed the appeal because the approach of the High Court on this plea was found to be incorrect. Again, in *Raja Ram v. State of Haryana*, Criminal Appeal No. 62 of 1968, D/- 26-3-1970 (SC) because of special feature like rejection by the court below of a considerable mass of evidence on serious charges, this Court looked into the evidence to see how far the case as framed against the appellant could be held proved.

18. Before us the entire case depends on the identification of the appellants and this identification is founded solely on test identification parades. The High Court does not seem to have correctly appreciated the evidentiary value of these parades though they were considered to be the primary evidence in support of the prosecution case. It seems to have proceeded on the erroneous legal assumption that it is a substantive piece of evidence and that on the basis of that evidence alone the conviction can be sustained. And then that court also ignored important evidence on the record in regard to the manner in which the test identification parades were held, and other connected circumstances suggesting that they were held more or less in a mechanical way without the necessary precautions being taken to eliminate unfairness. This is clearly an erroneous way of dealing with the test identification parades and has caused failure of justice. Shri Rana laid great emphasis on the fact that there is no enmity shown between the witnesses and the appellants. In our opinion, though this factor is relevant it cannot serve as a substitute for reliable admissible evidence required to establish the guilt of the accused beyond reasonable doubt. The evidence in regard to identification having been discarded by us as legally infirm and which does not connect the appellants with the alleged offence it cannot by itself sustain the conviction of the appellants. Non-disclosure on the record as to how and when

the Investigating Officer learnt about the appellants' complicity further adds to the lacuna in the prosecution case. These appeals are allowed and the accused acquitted.

Appeals allowed.

1970 CRI. L. J. 1158 (Vol. 76, C. N. 286) =
AIR 1970 SUPREME COURT 1330 (V 57 C 279)
(From. Bombay)

A. N. RAY AND I. D. DUA, JJ.
Sheshanna Bhumanna Yadav, Appellant
v. State of Maharashtra, Respondent.
Criminal Appeal No. 225 of 1969, D/-
8-5-1970.

Evidence Act (1872), Sections 133, 114
Illus. (b) — Evidence of approver and
accomplice — Necessity of corroboration
— Nature of corroboration required.

The warning of the danger of convicting on uncorroborated evidence is given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and some one who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. The first test of reliability of approver and accomplice evidence is for the court to be satisfied that there is nothing inherently impossible in evidence. After that conclusion is reached as to reliability, corroboration is required. AIR 1967 SC 792 and AIR 1957 SC 637, Ref.

(Paras 12, 13)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 792 (V 54) =
1967-1 SCR 243, Lachu Ram v
State of Punjab 13
(1957) AIR 1957 SC 637 (V 44) =
1957 SCR 953, Sarwan Singh v.
State of Punjab 13

FN/FN/C389/70/RGD/P

The following Judgment of the Court was delivered by

RAY, J.: This appeal by special leave is against the judgment dated 18th December, 1968 of the High Court at Bombay dismissing the appeal and confirming the conviction of Moti alias Narayan Sheshanna Yadav and Sheshanna Bhumanna Yadav accused Nos. 2 & 3 respectively except that the conviction of accused No. 2 of the substantive offence of murder under Section 302 was altered and accused No. 2 was convicted of an offence under Section 302 read with Section 120B as well as of offence under Section 302 read with Section 34 of the Indian Penal Code. The High Court confirmed the sentence of death passed against accused No. 3 Sheshanna Bhumanna Yadav. Accused No. 2 son of accused No. 3 was at the time of the judgment of High Court of 17 years of age. The High Court reduced the punishment of accused No. 2 to rigorous imprisonment for life. Accused No. 1 Hiralal was the domestic servant of Dr. Nanavati grandfather of the deceased Narendra. Accused No. 2 is the son of accused No. 3.

2. Accused No. 1 Hiralal Jamnadas Joshi, accused No. 2 Moti alias Narayan Sheshanna Yadav and accused No. 3 Sheshanna Bhumanna Yadav were charged with having entered into criminal conspiracy with approver Dinkar Sakharan between 19th December, 1967 and 4th January, 1968 at Deolali Camp for the purpose of committing the murder of Narendrakumar and committed house breaking and thefts in the house of his grandfather Dr. Nanavati and disposed of the property so obtained and caused the evidence of murder to disappear with the intention of screening the offenders from lawful punishment and that these acts were done in pursuance of the said criminal conspiracy, an offence punishable under Section 120B read with Sections 302, 454, 380, 414 and 201 of the Indian Penal Code. Accused Nos. 1 to 3 were further charged with having committed the murder of Narendrakumar in complicity with approver Dinkar Sakharan and the said murder came to be committed in furtherance of common intention of all the accused an offence punishable under Section 302 read with section 34 of the Indian Penal Code. They were further charged under Sections 201, 454, 380 and 411 of the Indian Penal Code.

3. Dr. Dalchand Nanavati the grand-

father of deceased Narendrakumar who met unnatural and unfortunate end at the hands of accused No. 2 and one Dinkar Sakharan, subsequently turned approver, resided at Deolali Camp at Dhondi Road in bungalow No. 17 for about 11 years. He was a registered medical practitioner. At the relevant time he was in pharmaceutical business for the manufacture of medicines. The head office was at Bombay. The branch was at Deolali. The owner of bungalow No. 17 was Narsanna Bhumanna Yadav brother of accused No. 3. Narsanna was a person of unsound mind and accused No. 3 was the holder of power of attorney. Accused No. 3 resided at the rear portion of bungalow No. 17. The bungalow was agreed to be sold to Dr. Nanavati. There were civil and criminal proceedings out of that transaction. Bungalow No. 17 was eventually sold to a third party on 11th May, 1964. In the sale deed it was said that possession of the portion in the occupation of Dr. Nanavati would be handed over to the vendee when the proceedings pending against Dr. Nanavati concluded. Dr. Nanavati succeeded in those proceedings. Therefore, possession could not be given by the vendor to the vendee.

4. In the month of November, 1967, Dr. Nanavati's wife left Deolali for Jodhpur. Dr. Nanavati also left Deolali and went to his native place leaving his grandson Narendra, who was about 15 years of age in the care of his domestic servant accused No. 1.

5. The prosecution case was as follows. Accused No. 3 thought that Dr. Nanavati's departure from Deolali leaving his grandson Narendra at the bungalow in charge of the domestic servant was a good opportunity to commit theft of articles in the house of Dr. Nanavati and to murder his grandson Narendra with a view to frightening Dr. Nanavati to vacate the bungalow. Accused No. 3 called Dinkar on 19th December, 1967 and suggested to Dinkar that the latter should commit the murder of Narendra after 21st December, 1967 when Dr. Nanavati would leave the bungalow and his grandson Narendra would be there with the domestic servant. Accused No. 3 proposed a reward to Dinkar, namely, a motor cycle and a further sum of Rs. 100. Accused No. 3 told Dinkar that the said accused had committed two murders prior to that date but nothing happened to him. Dinkar at first expressed his inability to undertake the job. Ac-

cluded No. 3 then said that Dinkar should take accused No. 2 who was the son of accused No. 3 for the job.

6. Accused No. 2 and Dinkar started getting familiar and friendly with Narendra. They visited his house regularly. They moved about with Narendra. On 25th December, 1967 accused No. 1 the domestic servant of Dr. Nanavati left Deolali and went to Bombay. Accused No. 2 and the approver Dinkar took Narendra out with the intention of murdering him but because of certain interruptions they could not muster courage to achieve that object. On 27th December, 1967 accused No. 3 called Dinkar and told him and accused No. 2 that he was going to Nasik in connection with some court work and they should murder Narendra and that he would look to everything after his return from Nasik. Nasik is about 5 or 7 miles from Deolali.

7. Accused No. 2 and Dinkar took Narendra to a lonely area beyond Barne's High School on the pretext of collecting clothes from a washerman and went to the house of the latter and collected a couple of garments. Thereafter they went to a garden where they drank water and then went to a open field. There they plucked fresh groundnuts and started eating them. Accused No. 2 and Dinkar took Narendra to a jowar field. Dinkar gave a blow with his hand on the neck of Narendra as a result of which Narendra fell down. Accused No. 2 and Dinkar held Narendra tightly. Dinkar sat upon his abdomen and started choking his throat with both his hands and accused No. 2 gagged his mouth and nose. Dinkar gave blows on Narendra's abdomen. After Narendra was choked for about 10/15 minutes, he breathed his last.

8. Accused No 2 then asked Dinkar to take out the key of the bungalow which he had seen Narendra putting in his pocket and Dinkar removed the key and gave it to accused No. 2. Accused No 2 scraped some earth and dug a small pit and placed Narendra in it, face downwards, and covered it with some loose earth. Accused No 2 and Dinkar then returned to the house of accused No 3. On being told that accused No. 2 and Dinkar had accomplished the murder of Narendra accused No 3 was happy and gave them Rs 10/- to celebrate the occasion by seeing a picture. Accused No 3 told accused No. 2 and Dinkar that the following day they must take out all the goods from the house of Dr. Nara-

vati and hand them over to him.

9. When Dinkar went to the house of accused No. 3 the following morning, Dinkar heard accused Nos. 2 and 3 saying that Dr. Nanavati would not be able to live in that bungalow any longer. Accused No. 2 and Dinkar then went to the bungalow of Dr. Nanavati and opened the lock with the key which had been removed from Narendra's pocket. Accused No. 2 and Dinkar locked the front door from outside and kept the back door ajar and removed a large number of articles which were in cupboards which they opened with the help of a bunch of keys which they found in the house. Accused No. 2 and Dinkar again went to the bungalow of Dr. Nanavati on the subsequent day. They removed two cycles and several other articles and handed them over to accused No. 3. Accused No. 3 gave to the approver Dinkar a cycle and some of the property which had been recovered from the house of Dr. Nanavati.

10. Dr. Nanavati returned to Deolali along with his wife on 4th January, 1968. They found the front door of the house locked. They made enquiries. Ultimately, they entered the house by breaking open the lock and found that Narendra was not in the house, that the whole house had been ransacked and the back door was ajar. Dr. Nanavati reported the matter to the police. Clue was furnished by a piece of cloth which had been stolen from the house of Dr. Nanavati. That piece of cloth had been given by accused No. 3 to the approver Dinkar who gave it to a tailor named Thakur for stitching a pair of trousers for him. Dr. Nanavati happened to go to the shop of Thakur and made enquiries about the piece of cloth which was found in the tailor's shop. Accused No. 2 and Dinkar took away the cloth from the tailor's shop when they heard of the enquiries about the piece of cloth. Dinkar gave some money to the tailor. Dinkar and accused No. 2 raised some money by pledging a cycle which they had with them. The police came to the tailor's shop, made enquiries and ultimately accused No 2 and Dinkar were arrested on 23 January, 1968. Dinkar pointed out the place of the occurrence to the police on that day. On 24-1-1968 some human bones were found at that place. On 25 January, 1968 accused No 3 was arrested. Dinkar and accused No 2 made various statements and led the police to various

places. Several articles stolen from the house of Dr. Nanavati were recovered. On 12th February, 1968, Dinkar made a full-fledged detailed confession.

11. In the High Court three questions were canvassed. First, whether there was corroboration in regard to the crime. Secondly, whether there was corroboration in regard to accused Nos. 2 and 3 being guilty of the offence. Thirdly, whether there was corroboration in regard to the approver's story about the conspiracy and the common intention by way of a pre-conceived plan to murder Narendia. The High Court found that there was corroboration of the evidence which connected accused Nos. 2 and 3 not only with the offence of theft but also with murder. The High Court also came to the conclusion that there was corroboration of the evidence of Dinkar in material particulars in regard to the connection of the accused with the crime and in regard to the conspiracy as well as the common intention.

12. The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114 illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and someone who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. If a witness says that the accused and he stole the sheep and he put the skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in

the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft.

13. This Court stated the law of corroboration of accomplice evidence in several decisions. One of the earlier decision is *Sarwan Singh v. State of Punjab*, 1957 SCR 953 = (AIR 1957 SG 637) and the recent decision is *Lachi Ram v. State of Punjab*, (1967) 1 SCR 243 = (AIR 1967 SC 792). In *Sarwan Singh's* case, 1957 SCR 953 = (AIR 1957 SC 637) (supra) this Court laid down that before the Court would look into the corroborative evidence it was necessary to find out whether the approver or accomplice was a reliable witness. This Court in *Lachi Ram's* case, 1967-1 SCR 243 = (AIR 1967 SC 792) (supra) said that the first test of reliability of approver and accomplice evidence was for the Court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime.

14. In the present appeal, counsel on behalf of the appellant contended that there was no corroboration of the actual participation in the murder and secondly that accused No. 3 could be guilty of theft but not of murder. The washerman said that Dinkar was his classmate and through Dinkar he came to know accused No. 2. The washerman further said that he used to wash the clothes of accused No. 2 and on 27th December, 1967, Dinkar and accused No. 2 came to the washerman's house to take out a few clothes which he had washed for them. The washerman also said that Dinkar and accused No. 2 had with them a boy who was of fair skin and wore khaki shorts and a white shirt.

15. Mohan Lal Boob, an agriculturist gave evidence that on 27th December, 1967, he was watering the crops. Three persons turned up one of whom was accused No. 2 and the other was known to him by face and the third was a boy of 14 or 15 years of age wearing khaki shorts and a shirt. Mohan Lal Boob said that he saw all of them sitting down in the field, drank water and purchased radishes from a woman who was sitting nearby.

16. It may be difficult to find corroborative evidence of the actual killing. Dinkar showed the place of occurrence. Eventually, a few things were discovered there, namely, a shirt, a chain, a skull having the upper jaw with 13 teeth, a bone, bunch of hair. These things were found on 28th January, 1968. The shirt and the chain were identified by Dr. Nanavati and his wife to belong to Narendra. A girl of 14 named Garadin Bride who was a classmate of Narendra said that Narendra wore a chain similar to the one that was shown. The medical evidence was that the bones were those of a human being probably a male. Beyond that the medical evidence does not assist the prosecution. The High Court found that the death of Narendra was not disputed because it was put to Dinkar in cross-examination that it was Dinkar alone who killed Narendra. Therefore, the medical evidence as to the skull and the bone is not of importance in view of the death of Narendra. Dr. Nanavati entered the house by breaking open the lock. He found the back door left ajar. The key which was produced by Dr. Nanavati was found to fit the lock though the lock could not be operated with the key in view of the fact that Dr. Nanavati had broken it open for gaining entry into the house.

17. There is also evidence of Kisan Prasad that after Christmas day in 1967 he saw a dead body which had on it khaki shorts and white shirt. If the murder of Narendra and the theft were not parts of the same transaction, Narendra would not have been taken out to the field to be murdered there to eliminate the possibility of detection. The close proximity between murder and theft points to the inescapable conclusion that they formed part of the same transaction. Narendra was seen alive by Kewal Ram, owner of the betel shop on 26th December, 1967. Hira Lal, the domestic servant of Dr. Nanavati left Deolali on 25th December, 1967. The theft could not have been committed before the murder because in that case there would be complaint by Narendra and the house in that case would also have been broken open for committing the murder. All these features prove that the murder and the theft formed the same transaction and were committed by the same persons. Narendra was seen alive in the company of accused No. 2 and Dinkar. That was the evidence of the washerman as also of

the agriculturist Mohan Lal Boob. These witnesses further identified the shorts and shirt of Narendra.

18. Accused No. 2 produced the piece of cloth which was identical with the cloth of the mattress cover produced by Dr. Nanavati. Both the pieces of the cloth were of the identical design. The pledging of the cycle by accused No. 2 is of significance. The cycle was identified both by Dr. Nanavati and his wife. The next piece of evidence is that accused No. 2 sold some utensils to Gadekar. One of the utensils was found to have a name thereon scraped off. There was also a piece of hand-writing with the signature of accused No. 2 at the foot of it and that was the list of the articles sold to Gadekar. There were some articles found from the tailor's shop. The evidence of the tailor was that those articles were given by accused No. 2. The discovery of the chain which Narendra wore was identified by Dr. Nanavati. Accused No. 2 sold a cycle carrier to Rupvate on 16th January, 1968. The sale of that article was discovered on 23rd January, 1968. Dr. Nanavati identified the cycle carrier. That identification was not challenged. All these pieces of evidence prove the connection of accused No. 2 with the crime.

19. With regard to accused No. 3 it is found that there were civil and criminal proceedings between him and Dr. Nanavati. Accused No. 3 had the motive not only to make it impossible for Dr. Nanavati to stay in the bungalow but also to commit theft in his house. Accused No. 3 gave several articles to a person called Takalkar. Takalkar had dealings with accused No. 3 in the past. Takalkar said that accused No. 3 gave him some pieces from silver idols and other silver articles and wanted money by disposing of the same. Takalkar purchased the entire silver material from accused No. 3 for Rs. 175/-. Takalkar also said that at the request of accused No. 3 he kept that bag of utensils in his godown and gave the key of the godown to accused No. 3 who afterwards returned the key. The police came to the shop of Takalkar and he was asked to produce the gunny bag which he did. The articles in the gunny bag were taken and the articles excepting the lump of silver were identified by Dr. Nanavati and by his wife. The identification was not challenged in cross-examination. It is obvious that silver lump could not be identified. At this stage it is to be noticed as to

whether there is evidence to connect accused No. 3 with murder. The transaction was one composite unit of murdering Narendra and committing theft.

20. The discovery of articles in the godown of Takalkar was as a result of a statement by accused No. 2. The name of accused No. 3 was found in the notebook of Takalkar. The relationship of father and son between accused No. 3 and accused No. 2 is not to be lost sight of. Accused Nos. 2 and 3 went together for the sale of cycle carrier to Rupvate. The High Court rightly came to the conclusion that there was sufficient corroboration of the evidence of Dinkar in material particulars and that Dinkar was a reliable witness and it was proved that accused Nos. 2 and 3 were guilty of the offence. In view of the fact that there was capital sentence on accused No. 3 we went through the evidence to find out as to whether there was any infirmity in evidence. We have found none.

21. The appeal therefore fails. The accused will surrender to his bail, if any.
Appeal dismissed.

1970 CRI. L. J. 1163 (Vol. 76, C. N. 287)
(GUJARAT HIGH COURT)*

D. A. DUBEY J.

Harilal Gangaram and others, Appellants v. State of Gujarat, Respondent.

Criminal Appeals Nos. 357 to 359 and 460 of 1968, D/- 10-1-1969, against order of City Magistrate Fourth Court, Ahmedabad in Criminal Appeal No. 724 of 1967.

Prohibition—Bombay Prohibition Act (25 of 1949), Ss. 98 and 99—Confiscation of things under sub-ss. (1) and (2) of S. 98 — Distinction pointed out — Before confiscating a vehicle, vessel or a conveyance, owner thereof must be given opportunity to show whether he had taken sufficient care to prevent commission of offence — Order of confiscation is not a mere consequential order following finding of fact recorded by Court.

There is understandable distinction between the things which must be straightway confiscated as provided by S. 98 (1) and the things which are liable to confiscation under S. 98 (2). This should be in the very nature of things. Things mentioned in Cls. (a) to (d) of S. 98 (1) should

straightway be confiscated because their possession per se is prohibited. They must be confiscated because they cannot be returned otherwise the person to whom it is returned would be committing the same offence over again. They are articles, the possession of which is per se prohibited in view of the provisions contained in the Bombay Prohibition Act. But vessels, conveyances, carts and animals used for transport of such prohibited articles are not per se prohibited and therefore, they cannot be straightway confiscated. They are liable to confiscation in view of the use made of such things.
(Para 19)

In view of S. 99 the articles which are liable to confiscation can only be confiscated after hearing the person claiming any right thereto and the evidence if any which he produces in support of his claim. The proviso to S. 99 makes it abundantly clear that vessel or vehicle or other conveyance cannot be confiscated if the owner satisfies the Court that he had exercised due care in preventing the commission of the offence. Therefore, before the Court proceeds to confiscate a vehicle, vessel or a conveyance, it must give an opportunity to the owner thereof to show whether he had used sufficient care to prevent the commission of the offence.
(Para 19)

It cannot be said that in all cases the order of confiscation is a consequential order or that there is a duty cast on the Court to confiscate every article coming before the Court trying the offences under the Bombay Prohibition Act.
(Para 20)

As soon as the Court comes to the conclusion that in respect of the articles set out in S. 98 (1) the offence appears to have been committed, under the Bombay Prohibition Act, the Court has no option but to confiscate those articles. Subsection (2) of S. 98 makes a distinct departure in respect of these things or articles which are not to be confiscated straightway but which are liable to confiscation and the things which are liable to confiscation have to be dealt with as provided by S. 99. Therefore, in respect of the things which are not to be confiscated but which are liable to confiscation the Court has to follow the procedure prescribed in S. 99 before the order of confiscation in respect of such things could be passed. It cannot therefore, be said that the order of confiscation is a mere consequential order following the

*Only portions approved for reporting by High Court are reported here.

findings of fact recorded by the Court. It may be that a person may be held guilty of possession of liquor imported in the motor truck and yet the truck need not be confiscated if it is found that it belongs to some other person who had exercised due care for preventing the commission of the offence. (Para 20)

It is true that anyone claiming any right to any vehicle, liable to confiscation must appear before the Magistrate and lodge his claim. But that does not mean that any formal claim by any specific application is required to be lodged before the Magistrate. If the owner of the vehicle is accused of the offence and is before the Court and he claims that he is the owner of a vehicle, it would be a duty of the Magistrate to inquire whether the owner has established his claim and has further established that he had exercised due care in preventing the commission of the offence. The very statement of accused under S. 342, Criminal P. C., would be in the nature of an application putting forth his claim to the vehicle. (Para 21)

In Cr. A. No. 357/1968 :

Rajni Patel with H. K. Thakore, for Appellant.

In Cr. A. No. 358/1968 :

D. K. Shah with H. K. Thakore, for Appellant.

In Cr. A. No. 359/1968 :

I. C. Bhatt, for Appellant.

In Cr. A. No. 460/1968 :

H. K. Thakore, for Appellant; G. M. Vidyarthi, Asst. Govt. Pleader, for Respondent (in all the appeals).

JUDGMENT:— 1-17.

18. It was urged on behalf of original accused No. 4 Hiralal Gangaram that the motor truck belongs to him and even though it was used for transport of contraband liquor, there is nothing to show that it was done with his consent, connivance or knowledge or at his instance and therefore, the motor truck was not liable to confiscation. On behalf of Jethanand Ishvardas it was contended that he entered into an agreement with Hiralal Gangaram accused No. 4 for the purpose of the said truck on 9-11-66 for Rs. 20,000/- and towards the purchase price he had paid Rs. 5,000/- in cash to Hiralal Gangaram and the balance of Rs. 15,000/- was to be paid in 15 monthly instalments each of Rs. 1,000/-. It was contended that this agreement was reduced to writing, and executed by the parties. On the basis of this agreement it was contended that

since 2-11-66 ownership of the motor truck had passed to Jethanand Ishvardas and there is nothing to show that this truck was used in transporting or importing contraband liquor with his consent, connivance or knowledge or at his instance and, therefore, the truck was not only not liable to confiscation but it should have been returned to him.

19. It was contended on behalf of original accused No. 4 that there is not a iota of evidence to show that the truck was used for transporting or importing contraband liquor or any prohibited article with his consent or connivance or knowledge or at his instance and the same was not liable to confiscation. S. 98 of the Bombay Prohibition Act provides as under :

"98. (1) Whenever any offence punishable under this Act has been committed,

(a) any intoxicant, hemp, mhowra flowers, molasses, materials, still utensil, implement or apparatus in respect of which the offence has been committed;

(b) where in the case an offence involving illegal possession, the offender has in his lawful possession any intoxicant, hemp, mhowra flowers or molasses other than those in respect of which an offence under this Act has been committed, the entire stock of such intoxicant, hemp, mhowra flowers or molasses,

(c) where, in the case of an offence of illegal import, export or transport, the offender has attempted to import, export or transport any intoxicant, hemp, mhowra flowers, or molasses, in contravention of the provisions of this Act, rule, regulation or order or in breach of a condition of a licence, permit, pass or authorization of the whole quantity of such intoxicant, hemp, mhowra flowers or molasses which he has attempted to import, export or transport;

(d) where in the case of an offence of illegal sale, the offender has in his lawful possession any intoxicant, hemp, mhowra flowers or molasses other than that in respect of which an offence has been committed, the whole of such other intoxicant, hemp, mhowra flowers or molasses shall be confiscated by the order of the Court.

(2) Any receptacle, package or covering in which any of the articles liable to confiscation under sub-s. (1) is found and the other contents of such receptacle, packet or covering and the animals, carts, vessels or other conveyances used in carrying any

such article shall likewise be liable to confiscation by the order of the Court."

The scheme of S. 98 would show that the things mentioned in clauses (a) to (d) are straightway to be confiscated. But in respect of any receptacle, package or covering in which any of the articles liable to confiscation under sub-s. (1) are found and the animals, carts, vessels, or other conveyances used in carrying any such articles they are not to be confiscated straightway but they are liable to confiscation. There is understandable distinction between the things which must be straightway confiscated as provided by S. 98 (1) and the things which are liable to confiscation. This should be in the very nature of things. Things like intoxicant, hemp, mhowra flowers, molasses, materials, still utensil, implement or apparatus in respect of which offence appears to have been committed under the Bombay Prohibition Act should straightway be confiscated because their possession per se is prohibited. They must be confiscated because they cannot be returned otherwise to the person to whom it is returned would be committing the same offence over again. They are articles, the possession of which is per se prohibited in view of the provisions contained in the Bombay Prohibition Act. But vessels, conveyances, carts and animals used for transport of such prohibited articles are not per se prohibited and therefore, they cannot be straightway confiscated. They are liable to confiscation in view of the use made of such things. Section 99 provides the procedure to be followed by the Court in respect of the things liable to confiscation before they are confiscated. Section 99 provides as under:

"99. When during the trial of a case for an offence under this Act the court decides that anything is liable to confiscation under the foregoing section, the Court may after hearing the person, if any, claiming any right thereto and the evidence if any, which he produces in support of his claim order confiscation, or in the case of any article other than an intoxicant, hemp, mhowra flowers or molasses give the owner an option to pay fine as the court deems fit in lieu of confiscation :

Provided that no animal, cart, vehicle or other conveyance shall be confiscated if the owner thereof satisfies the court that he had exercised due care in preventing the commission of the offence."

It appears that the articles which are

liable to confiscation can only be confiscated after hearing the person claiming any right thereto and the evidence if any which he produces in support of his claim. The proviso to S. 99 makes it abundantly clear that vessel or vehicle or other conveyance cannot be confiscated if the owner satisfies the Court that he had exercised due care in preventing the commission of the offence. Therefore, when anything liable to confiscation is to be confiscated the Court has to hear the person claiming any right thereto. Such a person has a right to lead evidence in support of his claim. He has also an option to pay fine in lieu of confiscation. In respect of the vehicle or conveyance the same cannot be confiscated if the owner shows that he had taken sufficient care to prevent the commission of the offence. He can do so by leading evidence. Therefore, before the Court proceeds to confiscate a vehicle, vessel or a conveyance, it must give an opportunity to the owner thereof to show whether he had used sufficient care to prevent the commission of the offence. In the instant case, the learned Magistrate has not given any opportunity to the owner namely Hiralal Gangaram to show that he has taken sufficient care to prevent commission of the offence. In fact before an order of confiscation is passed an inquiry as contemplated by S. 99 would be made. Such an inquiry is to be made in respect of the articles liable to confiscation and not those which are required to be confiscated as a necessary corollary as provided in S. 98 (1). The learned Magistrate has not even stated anywhere in the order confiscating the vehicle that he was satisfied that the owner had not taken sufficient care to prevent the commission of the offence. In fairness to the learned Magistrate it must be stated that as he convicted accused No. 4 the owner of the motor truck for the commission of the offence, no question of further inquiry arose. If the conviction of accused No. 4 would have been upheld the order of confiscation could not have been interfered with. But as the appeal of accused No. 4 is being allowed, it would mean that he is the owner of motor truck which has been confiscated and he should be given an opportunity to show that he had taken sufficient care to prevent the commission of the offence. The only obvious thing to do would be to set aside the order of confiscation of the motor truck bearing No. GTF 753 and to remand the case to the trial Court for passing appropriate

order under Ss. 98 and 99 of the Bombay Prohibition Act after giving opportunity to any person claiming any right to the motor truck No. GTF 753.

20. Mr. G. M. Vidyarthi, learned Assistant Government Pleader urged that the order of confiscation is a consequential order which must follow the findings of fact in the case and a duty is cast on the Court to confiscate anything in respect of which the offence appears to have been committed. In fact this line of approach ignores certain distinction made by the Legislature between Ss. 98 (1) and 98 (2) of the Bombay Prohibition Act. Section 98 (1) provides for confiscation of certain things in respect of which an offence appears to have been committed. In respect of those things such as intoxicant, hemp, mhowra flowers, molasses, materials, still utensil, implement or apparatus in respect of which an offence appears to have been committed they are straightway to be confiscated. As soon as the Court comes to the conclusion that in respect of the articles set out above the offence appears to have been committed, under the Bombay Prohibition Act, the Court has no option but to confiscate those articles. No other order could be passed and to that extent Mr. Vidyarthi is right in saying that there is a duty cast on the Court to confiscate such articles. Sub-section (2) makes a distinct departure in respect of these things or articles which are not to be confiscated straightway but which are liable to confiscation and the things which are liable to confiscation have to be dealt with as provided by S. 99. Therefore, in respect of the things which are not to be confiscated but which are liable to confiscation the Court has to follow the procedure prescribed in S. 99 before the order of confiscation in respect of such things could be passed. It cannot, therefore, be said that the order of confiscation is a mere consequential order following the findings of fact recorded by the Court. It may be that a person may be held guilty of possession of liquor imported in the motor truck and yet the truck need not be confiscated if it is found that it belongs to some other person who had exercised due care for preventing the commission of the offence. To take a simple illustration, a person in transport business was approached with a request that the truck is to be hired for transporting vegetables and while loading vegetables a few bottles of liquor were also loaded. If a search of

the truck is taken and bottles are recovered the person who hired the truck and transported vegetables would be in possession of the bottles and would be liable for possession of liquor. But in such circumstances, it is unconceivable that the motor truck could also be straightway confiscated. Therefore, before the motor truck could be confiscated the Court must make an inquiry as envisaged by S. 99 and give an opportunity to the owner of the motor truck to show that he had exercised due care for preventing the commission of the offence and if the Court is satisfied that he had exercised due care, the truck cannot be confiscated. Therefore, it cannot be said that in all cases the order of confiscation is a consequential order or that there is a duty cast on the Court to confiscate every article coming before the Court trying the offences under the Bombay Prohibition Act.

21. It was lastly urged that the language of S. 99 shows that anyone claiming any right to a vehicle liable to confiscation must appear before the Magistrate and lodge a claim and only then the Magistrate has to inquire about the validity of the claim and further if it is shown that the claimant is the owner of the vehicle liable to confiscation and he had exercised due care in preventing the commission of the offence only then his claim can be upheld. It was urged that the gist of the requirement is that the claim has to be made before a Magistrate before the Magistrate can be expected to undertake an inquiry as contemplated by S. 99. It appears that anyone claiming any right to any vehicle liable to confiscation must appear before the learned Magistrate and lodge his claim. But that does not mean that any formal claim by any specific application is required to be lodged before the learned Magistrate. If the owner of the vehicle is accused of the offence and is before the Court and he claims that he is the owner of a vehicle, it would be a duty of the Magistrate to inquire whether the owner has established his claim and has further established that he had exercised due care in preventing the commission of the offence. In the instant case, the accused No. 4 Harilal Gangaram did state that he is the registered owner of the motor truck and he has not committed any offence with which he was charged. As the learned Magistrate convicted him for abetting transport of liquor the learned Magistrate was perfectly justified in confiscating the motor truck. But as the appeal of accused No. 4 is being allowed

and he is being acquitted of the charge of abetting import of liquor, certainly, his claim that he is the owner of the motor truck and that it is not liable to confiscation will have to be inquired. The very statement under S. 342, Criminal P. C. would be in the nature of an application putting forth his claim to the vehicle. Therefore, there is a claim of accused No. 4 before the Court in respect of the vehicle which is confiscated and which in view of the fact that the conviction of accused No. 4 is being set aside will have to be inquired into by the learned Magistrate. It would be open to the learned Magistrate to confiscate the motor truck if the accused No. 4 fails to satisfy the Court that he had exercised due care in preventing the commission of the offence. Therefore, as stated earlier, the order confiscating motor truck No. GTF 753 will have to be set aside and the matter to that extent will have to be remanded to the trial Court for considering the claim of accused No. 4 keeping in view the provisions of Ss. 98 and 99 of the Bombay Prohibition Act.

Order accordingly.

1970 CRI. L. J. 1167 (Vol. 76, C. N. 288)

(JAMMU AND KASHMIR HIGH COURT)

S. M. FAZL ALI, O. J. AND JASWANT SINGH, J.
Ahad Joo Sarwal and others, Petitioners v. Nabir Joo Bicchu and others, Respondents.

Criminal Ref. No. 16 of 1969, D/- 31-10-1969.

Criminal P. C. (1898), S. 145 — Proceedings under — Magistrate discarding affidavits filed by parties in support of their claims on ground that affidavits were not sworn before him—Held, order of Magistrate was improper.

The provision of S. 145 does not make it obligatory that the affidavits put in by the parties in support of their respective claims should be sworn before a particular authority, person or court. In fact, it does not prescribe the manner in which the affidavits so put in are to be sworn or attested. (Para 3)

A perusal of the provisions of S. 539 and S. 539AA also makes it clear that it is not necessary that the affidavits filed in proceedings under S. 145, Criminal P. C. should be sworn before the Magistrate be-

fore whom such proceedings are pending. The use of the words "before such court or any magistrate or other court in the State" in S. 539 clearly gives an option to have the affidavits made by the deponents within the limits of the State to be sworn before such court or any magistrate or other court in the State. It is only in respect of an affidavit made outside the limits of the State that it is required that it should be sworn before the Tribunal competent in that behalf according to the law of the place where the affidavit is made. Moreover, the enquiry relating to the question of possession is a summary one and the amendments in S. 145, Criminal P. C. permitting the filing and use of affidavits were introduced by Act No. XLII of 1956 with a view to avoid undue delay, shorten the procedure and expedite the disposal of the matter. If in spite of these amendments the witnesses are still required to swear their affidavits before the magistrate before whom the proceedings are pending, it would completely nullify the object for which the aforesaid amendments were made. (Paras 3, 6)

There is also nothing in the Rules framed for the guidance of Criminal Courts subordinate to the High Court which may lead to a different conclusion. (Para 7)

The words "having authority to receive evidence" in clause (a) of S. 4 of the Oaths Act (1873) cannot be restricted to the authority of the court to receive evidence in the particular case, to which the evidence relates. But it refers to the jurisdiction and power of the court to receive evidence in any case. It cannot therefore be said that a magistrate who has no authority to receive evidence in any matter or upon whom no power is imposed or conferred by law, has no authority to administer oath or affirmation, and that the Magistrate seized with the matter under S. 145 is not bound to accept the affidavits sworn before such Magistrate or authority. AIR 1969 Manipur 3, Rel. on. (Para 9)

Cases Referred : Chronological Paras (1969) AIR 1969 Manipur 3 (V 56) = 1969 Cri L J 124, Leitanthem Bidhu Singh v. Khangirakpam Ibobi Singh 9

M. A. Latif, for Appellants, K. N. Raina, for Respondents.

JASWANT SINGH J.—This is a reference made by the learned Sessions Judge, Anantnag, recommending that the order dated 24-12-1968 passed by the Chief Judicial Magistrate, Anantnag, in proceeding

under S. 145, Criminal P. C. be set aside as he illegally declined to consider the affidavit evidence produced by the parties (on the ground that the affidavits not having been sworn before him were inadmissible and he be directed to pass fresh orders after considering the affidavits filed on behalf of the parties.)

2. The learned counsel for the petitioner has submitted that there is nothing in the Code of Criminal Procedure of our State to show that only those affidavits which are sworn before the Magistrate who is seized of the matter under S. 145, Criminal P. C. can be received as evidence and the observation of the learned Chief Judicial Magistrate to the effect that the affidavits not having been sworn before him were inadmissible in evidence is wholly baseless and erroneous.

3. The short question for determination in this reference is as to whether for purposes of proceeding under S. 145, Criminal P. C. it is necessary that the affidavits by witnesses and/or parties to those proceedings should be sworn before the very magistrate who is seized of the matter. Section 145, Criminal P. C. in so far as it is relevant for this case reads :

"Whenever a District Magistrate, sub-divisional Magistrate, or a Magistrate of the First Class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water, or the boundaries thereof within the local limits of his jurisdiction he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader within the time to be fixed by such Magistrate, and to put in written statement of their respective claims as respect the fact of actual possession of the subject of dispute (and further requiring them to put in such documents or to adduce by putting in affidavits the evidence of such persons as they rely upon in support of such claim).

* * * *

"The Magistrate shall then without reference to the merits or the claim of any such parties to a right to possess the subject of dispute peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the enquiry as far as may be practicable within a period of two months from the date of appearance of the parties before him and if possible decide the question whether any and which of the parties was at the

date of the order before mentioned in such possession of the said subject :

Provided that the Magistrate may if he so thinks fit summon and examine any person whose affidavit has been put in as to the facts contained therein."

A plain reading of the provision is enough to show that it does not make it obligatory that the affidavits put in by the parties in support of their respective claims should be sworn before a particular authority, person or Court. In fact, it does not prescribe the manner in which the affidavits so put in are to be sworn or attested.

4. Now let us see whether there is any other provision in law in force in the State requiring that the aforesaid affidavits should be attested by a particular authority, person or Court. The provision in the State Criminal Procedure Code relating to the mode and method of swearing affidavits are contained in Ss. 539, 539-A and 539-AA, Criminal P. C., which run as follows :

"Affidavits and affirmations to be used before any Court in the State may be sworn and affirmed before such Court or any Magistrate or other Court in the State, but if the affidavit or affirmation is made outside the limits of the State, it may be sworn or affirmed before any tribunal competent in that behalf according to the law of locality where the affidavit or affirmation is made.

When any application is made to any Court in the course of any enquiry, trial, or other proceedings, under this Code, and the allegations are made therein respecting any public servant the applicant may give evidence of the facts alleged in the application by affidavit and the Court may if it thinks fit order the evidence relating to such facts be so given.

Affidavit under this section shall be confined to and shall state separately such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true and in the later case the deponent shall clearly state the grounds of such belief".

"539-AA. (1) An affidavit to be used before any Court other than a High Court under S. 510-A or S. 539-A may be sworn or affirmed in the manner prescribed in S. 539 or before any Magistrate.

(2) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended".

A perusal of the above provisions also makes it clear that it is not necessary that the affidavits filed in proceedings under S. 145, Criminal P. C., should be sworn before the Magistrate before whom such proceedings are pending. The use of the words "before such Court or any Magistrate or other Court in the State" in S. 539, Criminal P. C., are significant. These words clearly give an option to have the affidavits made by the deponents within the limits of the State to be sworn before such Court or any Magistrate or other Court in the State. It is only in respect of an affidavit made outside the limits of the State that it is required that it should be sworn before the Tribunal competent in that behalf according to the law of the place where the affidavit is made.

(5) No ruling has been cited at the bar which can in view of the state of law in force in the State can be said to have a bearing on the matter in question. The rulings cited before us by the learned counsel for the respondents relate to Ss 539 and 539-AA of the Criminal P. C. 1898, which is in force in the rest of India.

(6) There is another compelling reason which impels to hold that the affidavits filed in proceedings under S. 145, Criminal P. C., need not be sworn before or attested by the very Magistrate before whom such proceedings are pending. The reason is that the enquiry relating to the question of possession is a summary one and the amendments in S. 145, Criminal P. C., permitting the filing and use of affidavits were introduced by Act No. XLII of 1956 with a view to avoid undue delay, shorten the procedure and expedite the disposal of the matter. If in spite of these amendments the witnesses are still required to swear their affidavits before the Magistrate before whom the proceedings are pending, it would completely nullify the object for which the aforesaid amendments were made.

(7) There is also nothing in the Rules framed for the guidance of Criminal Courts subordinate to the High Court which may lead to a different conclusion.

(8) There is also nothing in the Judicial Oath Rules 1950 (1894) which may point to the fact that the affidavits to be used in proceedings under S. 145, Criminal P. C., cannot be sworn before a Magistrate or Court other than the one before whom or in which such proceedings are pending. Rule 3 of the Judicial Oath Rules which

relates to the authorities who are competent to administer oaths and affirmations reads :

"All Courts and persons having by law or consent of parties, authority to receive evidence, are authorised to administer by themselves or by an officer empowered by them in this behalf oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred on them respectively by law".

The above rule clearly lays down that all Courts and persons who have by law or consent of the parties power to receive evidence can administer oaths and affirmations.

(9) While dealing with the contention that under S. 4 of Indian Oaths Act, (which corresponds to Rule 3 of our Judicial Oath Rules), it is only in the discharge of the duty or in exercise of the powers imposed or conferred on them respectively by law that Courts as well as persons are authorised to administer oaths and affirmations and that, therefore, a Magistrate who has no authority to receive evidence in any matter or upon whom no power is imposed or conferred by law, has no authority to administer oath or affirmation. Jagannadha Charyulu J. C. observed in *Leitanthem Bidhu Singh v. Khangirakpam Ibobi Singh*, AIR 1969 Manipur 3 as follows :

"The words "having authority to receive evidence" in Cl. (a) of S. 4 of the Oaths Act, cannot be restricted to the authority of the Court to receive evidence in the particular case, to which the evidence relates. But it refers to the jurisdiction and power of the Court to receive evidence in any case, which jurisdiction or authority must be conferred upon the Court either by law or by consent of the parties. Third Class Magistrate has by law the authority to receive evidence, he is competent to administer oaths and affirmations to every one under S 4 of the Indian Oaths Act. If the parties are directed to swear before the concerned First Class Magistrate who is enquiring into the case, then it will only be a needless waste of time for him and the proceedings are bound to drag on. The witnesses who are out of station and who cannot be conveniently called to the Court will have to be compelled to appear before the concerned Magistrate or a Magistrate authorised by the concerned Magistrate to administer the oath".

(10) For the foregoing reasons we are of the opinion that the Magistrate exer-

cising jurisdiction under S. 145, Criminal P. C., can use the affidavits sworn before or attested by any Magistrate other than himself. According to the observations of the learned Chief Judicial Magistrate that it is well established that the affidavits attested by any Magistrate other than the Magistrate seized of the matter are inadmissible in evidence, cannot be upheld. As the learned Chief Judicial Magistrate has illegally discarded the affidavits filed by the parties, the order made by him cannot be upheld.

(11) We, therefore, allow this reference, set aside the order passed by the Chief Judicial Magistrate and remand the case to him for disposal in accordance with law after deciding whether the provisions of S. 145, Criminal P. C., are attracted in this case and if so whether the petitioner is entitled to the relief sought for by him on the basis of the evidence adduced by the parties.

Reference allowed.

1970 CRI. L. J. 1170 (Vol. 76, C. N. 289)

(KERALA HIGH COURT)

F. K. MOIDU, J.

Mathai Varghese, Petitioner v. Kuriacko Chacko, Respondent.

Criminal Revn. Petn. No. 529 of 1969, D/- 28.1.1970.

Criminal P. C (1898), S. 145 (5)—Stay under—Simultaneous civil suit in respect of same property—No injunction or appointment of receiver by Civil Court—Proceedings under S. 145 need not be stayed—Question of stay does not depend upon ultimate result of civil suit but upon immediate necessity for avoidance of breach of peace involved. AIR 1961 Raj 216 : ILR (1961) 11 Raj 1180, Foll. ; AIR 1969 Raj 82 & AIR 1955 Trav Co 190 & AIR 1959 Mys 122 & (1962) 2 Cr L J 709 (Mys), Not foll., AIR 1968 SC 1444 & AIR 1947 Mad 133 & AIR 1945 Mad 1017, Ref. (Paras 8, 9)

Cases Referred . Chronological Paras

- (1969) AIR 1969 Raj 82 (V 56) =
1969 Cri L J 441, Sajjan Singh v.
Sajjan Singh 4
(1968) AIR 1968 SC 1444 (V 55)=
1969 Cri L J 13, B. H. Butani v.
Mani J. Desai 5
(1962) 1962 (2) Cri L J 709 (Mys),
Multani v. Shah Abdul Turaf
Quadri 4

CN/DN/B389/70/MNT/C

- (1961) AIR 1961 Raj 216 (V 48) =
1961 (2) Cri L J 52 (FB), Tikupda
v. State 4
(1961) ILR (1961) 11 Raj 1180,
Chairman Municipal Board,
Bhadra v. State 4
(1959) AIR 1959 Mys 122 (V 46) =
1959 Cri L J 621, Malkappa v.
Padmanna 4
(1955) AIR 1955 Trav-Co 190 (V 42)
=1955 Cri L J 1212, Joshua
Sankaran v. Verghese Jacob 6
(1954) AIR 1954 Mad 1017 (V 41)=
1954 Cri L J 1558, In re, Sambha
Shiv Rao 8
(1947) AIR 1947 Mad 133 (V 34)=
48 Cri L J 435, Amritlal N. Shah
v. Nageshwara Rao 7
Panicker and Potti, for Petitioner; K.
Raveendranathan Nair, for Respondent.

ORDER — The short point that arises for determination in this petition is whether an Executive First Class Magistrate proceeding with an enquiry under S. 145, Criminal P. C., in respect of an immovable property is bound to cancel the interim order passed under sub-s. (1) of S. 145 or to stay the proceedings thereof and forward the records of the proceedings to a Civil Court of competent jurisdiction to decide the question whether any or which of the parties was in possession of the subject-matter of the dispute if one of the parties to the proceedings filed a suit in such Civil Court in respect of the same subject-matter.

2. The respondents herein are the complainants before the Executive First Class Magistrate and the petitioners are the opposite party. There was an interim order in the instant case under sub-s (1) of S. 145, Criminal P. C., placing the disputed property under attachment pending the dispute and appointing the Village Officer, Ettumanoor, in charge of the properties as the agent of the Court below. The suits filed by the petitioners in respect of the same property in O. S 214/69 and O S 215/69 are pending trial at the Munsiff's Court Kottayam. It is admitted that these suits have been filed even some time prior to the proceedings under S 145 had been taken up by the lower Court. However, the petitioners did not get either an order of interim injunction or any order appointing a receiver in respect of the property through the Munsiff's Court, though the suits are one for declaration as well as for a permanent injunction restraining the respondents herein from entering upon the property.

3. The contention of the learned counsel of the petitioners is that once the Executive First Class Magistrate took action under S. 145 (1), Criminal P. C., followed up by an attachment of the property by placing it in the hands of a Receiver under sub-s. (4) of S. 145, Criminal P. C., the hands of the Magistrate are tied if a suit is filed in respect of the same subject-matter and, therefore, he is bound to follow the provisions of sub-s. (5) of S. 145, Criminal P. C. The sub-s. (5) reads as follows:—

“Nothing in this section shall preclude any party so required to attend or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-s. (1) shall be final.”

4. There is a long line of cases in the High Court of Rajasthan to the effect that when a dispute about certain immovable property is pending before a civil Court and one of the parties thereto moves a Magistrate to take proceedings under S. 145, Criminal P. C., about the same immovable property, the Magistrate in a suitable case can proceed under S. 145 Criminal P. C. This is the purport of the decision reported in *Tikuda v. State*, AIR 1961 Raj 216 wherein it is observed that the jurisdiction of the Magistrate to proceed under S. 145 is not ousted simply because a suit upon the same immovable property is pending in a civil or revenue Court. Again in *Chairman, Municipal Board, Bhadra v. State*, 1 L R (1961) 11 Raj 1180, it was pointed out that there was nothing to prevent the Magistrate from taking action under S. 145, Criminal P. C. even where a civil case was pending between the parties in respect of the same subject matter. However, an opposite view had been taken in *Malkappa v. Padmanna* AIR 1959 Mys 122 in which it was held that the provisions of S. 145, Criminal P. C. should not be invoked when civil litigation with identical property was actually pending. More or less in the same way, in *Multani v. Shah Abdu Turab Qadari*, 1962 (2) Cri L J 709 (Mys), it was held that interim injunction granted by a civil court should be respected by a criminal court. In view of the conflicting decisions I am of the opinion that the view adopted by Rajasthan High Court is based on a more re-

asonable ground than the decisions of other High Courts. It is the duty of the Magistrate to take preventive action if the direction under S. 145, Criminal P. C., is not effective in any particular case. Ordinarily whenever there is dispute involving rights of parties leading to a breach of peace, there is nothing to prevent the Magistrate from taking recourse to S. 145, Criminal P. C. in a suitable case even when a civil suit is pending between the rival parties in respect of the same subject matter. That is the view which was again reiterated by Rajasthan High Court in *Sajjan Singh v. Sajjan Singh*, AIR 1969 Raj 82.

5. Section 145 proceedings are of a summary nature the object of it being to preserve law and order with the right of the aggrieved party to remedy their grievance in a civil court. It is to prevent a breach of peace that action is taken under S. 145 by the Magistrates having jurisdiction over the area. The object of this section is explained in paragraph 8 of the decision reported in *R. H. Bhutani v. Mani J. Desai*, AIR 1968 S C 1444. It is as follows:

“The object of S. 145, no doubt is to prevent breach of peace and for that end to provide a speedy remedy by bringing the parties before the court and ascertaining who of them was in actual possession and to maintain status quo until their rights are determined by a competent court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied of these two conditions, the section requires him to pass a preliminary order under sub-s. (1) and thereafter to make an enquiry under sub-s. (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or exist. The enquiry under S. 145 is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties.”

6. The object being as above, the question whether the Magistrate is bound to stay the proceedings or to cancel the order or to send the records in the case to a civil court on the simple ground that there is a civil litigation pending in such a court in respect of a dispute involving the rights of the parties over the same property did not depend upon the ultimate

result of the civil court, but it depended upon the immediate necessity for avoidance of a breach of peace involved in the case. I have already stated that a mere filing of the suit by itself is no reason for the Magistrate to stay the proceedings. But, if the Munsiff had appointed a Receiver in respect of the said property involved in the suit or had issued any order restraining the defendant from disturbing the plaintiff's possession thereof after finding that the later case of possession was *prima facie* true, the Magistrate could have taken his stand under S. 145 (5), Criminal P. C. The Travancore-Cochin High Court fell in line with the Rajasthan High Court in holding that the progress of the proceeding under S. 145, Criminal P. C. cannot be curtailed by filing of a suit in a civil court on the same subject-matter. In *Joshua Sankaran v. Verghese Jacob*, AIR 1955 Trav-Co 190 the reasoning of the court on those lines is given in the following passage,

"If the civil Court has itself appointed a Receiver and taken possession of the property or has issued any order restraining the defendant from disturbing plaintiff's possession, after finding that the latter's case of possession is *prima facie* true, the Magistrate should stay his hands. But where no Receiver has been appointed by the civil Court and the plaintiff's case of possession is only pending investigation and decision by that Court, the Magistrate cannot keep quiet if he is satisfied that the dispute about possession is likely to result the dispute in a breach of the peace. To prevent anything like that happening he could attach the property and place it in the hands of a Receiver."

7. In another decision reported in *Amritlal N. Shah v. Nageswara Rao*, AIR 1947 Mad 133 at page 134 Kuppaswamy Iyer, J. stated as follows :

"This is not a case in which matters should have to be dropped by reason of S 145 (5). It is only if there has been a subsequent settlement or if the petitioner agreed to give up the leasehold right and not claim to get back possession of the property, action can be taken under S. 145 (5). Merely because there has been no further violence, it could not be said that there cannot be a breach of the peace and proceedings should be dropped."

8. Though this decision was not approved in *In re, Sambasiva Rao*, AIR 1954 Mad 1017, Balakrishna Iyer, J. was of the opinion that in case of a party after

getting a preliminary order under S. 145 (1), Criminal P. C. passed against him, but then he went to the appropriate civil Court and filed a suit and obtained an order for the appointment of a Receiver, it would be perfectly futile for the Magistrate to go on with his enquiry and, in fact, if he did so, it would result a conflict between his order and that of the civil Court. In such cases, the learned Judge was of the opinion that in view of the provisions of sub-s. (5) of S 145, Criminal P. C. it was unnecessary for the Magistrate to proceed with the enquiry as, according to the learned Judge, no such dispute was to exist within the meaning of sub-s. (5) in which case the Magistrate was either to cancel the order or the proceedings be stayed. But, nowhere in S. 145, Criminal P. C., it is stated that the proceedings shall be sent to a civil Court even if the contingency mentioned in S. 145 (5) is established. Under that section, the Magistrate is bound to send the proceeding to a civil Court only if he is of the opinion that none of the parties was in possession or he is unable to decide as to which of them was in possession of the subject-matter of the dispute. The Magistrate in the instant case did not yet make a final enquiry to come to any such conclusion. In this case the petitioners also did not get any order either by way of interim injunction or any order appointing the Receiver at the civil Court, though suits were said to be pending for permanent injunction. In the absence of any order in the above lines, the hands of the Magistrate are not tied in proceeding with the enquiry under sub-s. (4) or (6) of S 145, Criminal P. C. and come to an independent conclusion by himself on the sole ground that suits have been filed in civil Court in respect of the property involved in the proceeding

9. In the proceedings before the lower Court it was seen that there had been substantial disputes between the parties. The petitioners had been worsted in a criminal Court resulting in conviction against them under Ss. 148 and 447, Penal Code in respect of the same property. If there was apprehension of breach of peace, the Magistrate is bound to proceed with the enquiry and pass appropriate orders. It cannot, therefore, be said that no dispute existed either at the time of the filing of the petition or at any time thereafter. The interim appointment of a Receiver by the Magistrate's Court by itself is not indication that there had been

a cessation of apprehension of breach of peace. If we take away the proceedings from the file of the Magistrate and hand it over to the civil Court pending enquiry under S. 145, Criminal P. C. it would affect the maintenance of breach of peace which is the sole aim of Magistrate taking action under S. 145, Criminal P. C. It would be open to the petitioners at any time to produce an order from the civil Court either restraining the respondents from entering upon the property or getting an order passed in their favour appointing a receiver in respect of the property involved in the dispute. In the absence of any such order, I think it is competent for the Executive First Class Magistrate to proceed with the enquiry. I am, therefore, of the opinion that the refusal of the stay passed by the Magistrate in the circumstances of the case is competent and no interference is called for by this Court in revision.

10. In the result, the revision petition is dismissed.

Revision dismissed.

1970 CRI. L. J. 1173 (Vol. 76, C. N. 290)

(KERALA HIGH COURT)

E. K. Moideu, J.

N. E. Vasudevan Nair, Petitioner v. Kalyani Amma Gouri Amma and others, Respondents

Criminal Revn. Petn. No. 16 of 1969, D/- 8-10-1969.

(A) Criminal P. C. (1898), S. 488 — Order for maintenance — Enforcement — Compromise between parties as to amount to be allowed to children — Terms as to rate of maintenance clear — Order passed in terms of compromise — Criminal Court has jurisdiction to enforce its own order, even though passed on basis of compromise — AIR 1958 Mys 190 and 1955 Andh W R 441 and AIR 1950 All 454 and AIR 1965 All 129, Foll.

(Paras 5, 6)

(B) Criminal P. C. (1898), S. 488 — Order for maintenance of children — Grounds — Minority of children is not the only circumstance to grant maintenance under section — A I R 1970 S C 446, Rel. on. (Para 7)

(C) Criminal P. C. (1898), S. 488 — Order for maintenance — Proceedings are not in nature of criminal proceeding — They are civil proceedings dealt with

summarily in criminal Court on grounds of convenience and social order (Para 7)

(D) Criminal P. C. (1898), S. 489 — Alteration in allowance — Enhancement of maintenance rate — Change in circumstances — Order of maintenance against father in favour of children — Increase in salary of father from time of original order is a valid circumstance to grant enhancement: AIR 1961 Andh Pra 510, Foll. (Para 7)

Cases Referred: Chronological Paras

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| 522, Nanakchand v. Sri Chandra | |
| Kishore Agarwala | 7 |
| (1965) AIR 1965 All 129 (V 52)= | |
| 1964 All L J 72=1965 (1) Cri L J | |
| 273, Nathuram v. Smt. Ramsri | 6 |
| (1961) AIR 1961 Andh Pra 510 | |
| (V 48) = 1961 (2) Cri L J 760, | |
| Wudali Gangamma v. Wudali | |
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| ram v. Retrawadi Ammal | 5 |
| (1950) AIR 1950 All 454 (V 37)= | |
| 1950 All L J 351=51 Cri L J 961, | |
| Punn Deb v. Bishnuli | 6 |
| K. C. John, for Petitioner; M/s. K. Vela- | |
| yudhan Nair, V. S. Moothath and N. R. K. | |
| Nair, for Respondents. | |

ORDER — The petitioner, who was the husband of the 1st respondent and father of respondents 2 to 5, has come up in revision against the order of the Sub-Divisional Magistrate, Chengannur in Criminal Miscellaneous Petn. No. 862/68 which arose out of miscellaneous case No. 54/62 of the same court enhancing the maintenance to be paid by the petitioner to the respondents 2 to 5 from Rs. 22 to Rs. 50 a month.

2. The respondents filed miscellaneous case No. 54/62 in the lower court under S. 488, Criminal P. C., for maintenance alleging that the petitioner neglected to maintain them. During the pendency of that petition the marriage relationship between the petitioner and the 1st respondent was dissolved through court and the claim of respondents 2 to 5 for maintenance to be paid by the petitioner was also settled on the basis of a compromise petition put in the lower court on 7-2-63. The petitioner and the 1st respondent allowed an order to be passed by the lower court granting maintenance to res-

pondents 2 to 5 at the rate of Rs. 5.50 each every month beginning from 7-2-63. That order has been in force since then.

3. While so, the respondents filed the criminal miscellaneous petition referred to above in miscellaneous case No. 54/62 on 5-6-68 demanding for higher rate of maintenance to respondents 2 to 5 at the rate of Rs. 100 a month on the ground that there had been change in the circumstances of the parties. The respondents contended that at the time of the filing of the compromise petition the salary of the petitioner as an assistant teacher was only Rs. 140 while his present salary as the Headmaster of one Lower Primary School at Kayamkulam was Rs. 278 as shown in Ext P. 1 certificate issued by the Assistant Educational Officer, Kayamkulam. The petitioner, without disputing the quantum of his salary, contended that he had to maintain his second wife and to pay instalments of the money which he borrowed as loan from the Government as well as to contribute amount to the Provident Fund. But, the court on a consideration of the evidence in the case passed the impugned order on 23-11-68 enhancing the rate of maintenance to Rs. 50 from the original amount of Rs. 22. The sum Rs. 50 was fixed allowing Rs. 20 to the 2nd respondent and Rs. 10 each to the respondents 3 to 5.

4 The learned counsel of the revision petitioner raises the question that once a compromise was entered into between the petitioner and the 1st respondent in respect of the maintenance claim made by respondents 2 to 5 there had been a conclusive settlement of the claim which thereafter could be agitated only through civil Court and that the lower Court exercising jurisdiction under S. 488, Criminal P. C. has no right to entertain a petition under S. 489, Criminal P. C. and afford any relief towards the claim for enhanced maintenance. As according to the learned counsel the contention under S. 489, Criminal P. C. that there had been change in the circumstances of the parties would tantamount to an unsettling solemn contract entered into between the parties under the compromise deed. So, it is contended that the claim for enhanced maintenance is not sustainable.

5 It is admitted that the compromise petition dated 7-2-63 in the earlier proceeding was made by the petitioner and the 1st respondent jointly agreeing the petitioner to pay maintenance at the rate of Rs. 5.50, to each of the respondents 2

to 5 a month and that on the basis of that petition the Court below passed an order to that effect. Though there was an agreement in the compromise petition that the maintenance shall be paid at the rate agreed upon by them until the children attain the age of majority, no such condition was attached to the order passed by the lower Court on the same date. It is, therefore, clear that the compromise relied upon in the instant case is not connected with any other consideration or condition. The order was to pay maintenance at certain rate to the children of the petitioner.

If the compromise contains a clear term as to the rate of maintenance and that term is independent of other terms, if any, in the compromise, then a criminal Court can very well direct the payment of the maintenance as there is no difference whether the amount of the maintenance has been fixed after taking evidence from the parties or on an agreement of the parties. It may be stated that in such cases the proper course is to refer the parties to the civil Court. But, in that case the fundamental principle underlying S. 488, Criminal P. C., will be effaced denying means of livelihood to those who are entitled to it. Hence the only possible course to be pursued in a case like this is that if the terms as to maintenance are independent of other terms of the compromise then the criminal Court can found its order as to maintenance on a compromise and enforce it. This is the view expressed in *Dr. T. K. Thayumanavar v. Asanambal Ammal*, AIR 1958 Mys 190. The observation is as follows:

"Enquiry under Chap. XXXVI, Criminal P. C. is a quasi-criminal one. Admission made in the pleadings can be taken into consideration and acted upon. It is therefore within the competence of a Magistrate to accept the representations made by parties and pass an order under S. 488, Criminal P. C. giving effect to the compromise agreed between the parties as to the rate of maintenance."

This line of reasoning was in consonance with the view expressed by His Lordship Chandra Reddi, J. (as he then was) in the case of *G. D. Sundaram v. Retnavadi Ammal*, 1955 Andh WR 441. In that decision law on the point had exhaustively been reviewed to come to the conclusion that in an application under S. 488, Criminal P. C., when parties came to an understanding as regards quantum of

maintenance it only would help the Magistrate in coming to a conclusion on the question of proper maintenance to be awarded. An order of Court passed on such an agreement is valid and can be enforced. It is thus within the competence of a Magistrate to accept those representations made by parties and pass an order under S. 488, Criminal P. C., giving effect to the compromise agreed between the parties as to the rate of maintenance. I am in full agreement with the above view. In the instant case, the learned Magistrate passed an order after examining both the petitioner and the 1st respondent on the basis of the compromise. There was no other consideration which weighed with the lower Court or the compromising parties when the Court came to the conclusion as regards the rate of maintenance to be paid to the respondents 2 to 5 under S. 488, Criminal P. C.

6. While commenting upon the question of law involved in similar case *Agarwala, J.*, observed as follows in *Punn Deb v. Bishnuli*, 1950 All L J 351: (AIR 1950 All 454):

"The compromise arrived at merely denotes that the parties agreed as to the amount that should be paid When the compromise is arrived at the Court is not bound to give effect to it though it will usually give effect to it. After the compromise has been arrived at the Court has still to pass an order. If it passes an order in terms of the compromise, then it is that order and not the compromise that is sought to be enforced subsequently."

Similar view was expressed by Mathur, J. in *Nathuram v. Smt. Ramsri*, 1964 All L J 72=(AIR 1965 All 129) holding that the compromise arrived at between the parties earlier was to be given due weight while determining the amount of maintenance payable to a party in the event of an application under S. 488, Criminal P. C. being allowed. Once a compromise is arrived at pending an application for maintenance under S. 488, Criminal P. C. and an order is passed thereupon granting maintenance to the party concerned, the basis of the order is not the terms of the compromise but the final order passed by the Magistrate fixing the rate of maintenance. Therefore, in proceedings under S. 488, Criminal P. C. if the parties arrived at a compromise as to the amount that should be allowed to the children and the Court passed an order in terms of the

compromise the criminal Court has jurisdiction to enforce its own order even though it is passed on the basis of the compromise.

7. In view of the above principles of law, I am of the opinion that the order dated 7-2-63 is a valid order passed by the lower Court though based upon a compromise and that the petitioner is not entitled to challenge its correctness on the ground that the terms of the compromise had not been adhered to. The learned counsel of the petitioner points out that the compromise was to pay a certain rate of maintenance until the minors attain majority. That part of the condition was not accepted by the lower Court while passing the order. Even otherwise such a contention cannot be entertained as it would offend the principle contained in S. 488, Criminal P. C. Section 488 (1) does not define 'child.' The word is personified as 'a child unable to maintain itself.' That shows that the intention of the Legislature was not to restrict the claims for maintenance to minor children alone. Minority of the children is not the only circumstance to grant maintenance under the section. In this regard the following observation in *Nanakchand v. Sri Chandra Kishore Agarwala*, (1969) S C W R 1176 = (AIR 1970 S C 446) may be seen :-

"In S. 488 of the Criminal P. C. the word, "child" is used with reference to the father. There is no qualification of age, the only qualification is that the child must be unable to maintain itself. There is no justification for saying that this section is confined to children who are under the age of majority. In view of the reason it has to be held that the word "child" in S. 488, Criminal P. C. does not mean a minor son or a daughter and the real limitation is contained in the expression, "unable to maintain itself."

Hence the compromise entered into between the petitioner and the 1st respondent towards the claim of the minor children restricting their right of maintenance to their age of majority will offend the provisions of S. 488, Criminal P. C. and the Court will not be justified in giving effect to it. The compromise petition in its entirety cannot, therefore, be enforced against the respondents 2 to 5 who are, on the other hand, governed by the order on the strength of which maintenance was allowed to them. The proceedings under S. 488, Criminal P. C. are not in the nature of criminal proceedings. They are

really civil proceedings, but dealt with summarily in a criminal Court for the purpose of speedy disposal on grounds of convenience and social order. The father of the minor children stands in a fiduciary position in relation to them as he is their natural guardian. It cannot, therefore, be seriously contended on behalf of the father that a compromise with his divorced wife is ipso facto binding on the minor children. It is the duty of the criminal Court to see as does a civil Court whether a compromise is really beneficial and advantageous to the minors and more so when the claim is for their maintenance.

Such a consideration though may not arise in the circumstance of this case as an order had been passed by the lower Court the fixing the rate of maintenance apart from and independent of compromise. There is nothing, therefore, wrong in the lower Court making an enhancement of the maintenance rate when there are valid circumstances. It is admitted that the original claim was made on the allegation that the petitioner neglected to maintain the children and that an order was passed accordingly. Now the contention of the respondents is that there was a change in the circumstances of the petitioner. The Court below is, therefore, justified in taking into consideration those circumstances and granting enhanced maintenance. In a similar case reported in *Wudali Gangamma v. Wudali Subbarayudu*, AIR 1961 Andh Pra 510 maintenance was fixed at Rs. 35/- per mensem in 1948 when husband was drawing Rs. 124/- per mensem as salary being a teacher. In 1958 husband was earning Rs. 450/- per mensem as Principal of a High School. The rate of maintenance was altered to Rs. 100/- per mensem. This is a similar case wherein the circumstances of the father have changed from the date of the original order. The Court below is therefore fully justified in giving enhanced rate of maintenance to respondents 2 to 5.

8 The learned counsel of the petitioner did not argue that the rate of enhanced maintenance awarded in this case is excessive.

9 In the result, the petition fails and the same is dismissed.

Petition dismissed.

1970 CRI. L. J. 1176 (Vol. 76, C. N. 291)

(MADHYA PRADESH HIGH COURT)

K. L. PANDEY AND A. P. SEN JJ.

Pandit Ramjilal Tiwari, Appellant v. Shri Vijai Kumar and others, Respondents.

First Appeal No. 82 of 1968, D/- 10-10-1969

(A) Evidence Act (1872), Ss. 101 to 104 — Sale of house Receipt of full consideration admitted by owner in sale-deed — Plea of non-receipt of consideration — Evidcn is on the owner to explain the admission in the sale deed and prove non-receipt of consideration. (1907) ILR 29 All 184 (P. C.), Relied on. (Para 11)

(B) Contract Act (1872), S 2 (d) — Sale of a house — Passing of consideration — Third party cannot challenge. (Para 16)

(C) Evidence Act (1872), Ss. 91, 92 — Execution of sale-deed — Allegation of collateral agreement between the parties that the deed will be nominal and will not be acted upon — Agreement not hit by Ss 91 and 92 and can be proved — Both direct and circumstantial evidence can be considered in support of the alleged agreement. (Para 17)

Cases Referred : Chronological Paras (1967) S. A. No. 16 of 1967, D/- 16-

11-1967 = 1969 Jab L J 954,
Ghulam Mohammad v. Pooran-
chand

20

(1907) ILR 29 All 184 = 34 Ind App
27 (P C), Chandra Kanwar v.
Narpat Singh

11

S. C. Dube, for Appellant, Y. S. Dhar-
madhikari, for Respondent No. 1.

PANDEY J.—This appeal by the defendant 2 is directed against a decree declaring the plaintiff to be the owner of the disputed house, placing him in possession thereof and directing the defendant 2 to pay Rs. 720/- as damages for use and occupation of the house. The defendant 1 too has filed First Appeal No. 84 of 1968 against the decree so far as it relates to his eviction from the house. This judgment shall dispose of the two appeals.

2 The material facts, which are now in controversy, are these. The house in dispute belonged to the defendant 2 who executed in favour of the defendant 1 a sale deed dated 26th December 1959, for an apparent consideration of Rs. 8,000/-. By a sale deed dated 5th December 1962 the defendant 3 sold the house to the plaintiff for Rs. 9,000/. On that date, the

defendant 1 was in possession of the house.

3. According to the plaintiff, he became by virtue of the sale deed dated 5th December 1962, the owner of the house. He claimed that he bona fide required the house for the residence of himself and the members of his family and that he had no other house of his own at Damoh which was reasonably suitable for such residence. Treating the defendant 1 as a tenant in occupation of the house, the plaintiff served upon him two notices to quit dated 1st May, 1964 and 6th July 1964 and thereby terminated his tenancy. Subsequently, on learning that the defendant 1 had colluded with the defendant 2 and was setting up the latter's title to the disputed house, the plaintiff served upon him yet another notice dated 8th April 1967 forfeiting the tenancy. The plaintiff claimed Rs. 2,160/- as damages either from the defendants 1 and 2 or from the defendant 3.

4. The defendant 3 admitted the material averments of the plaint, did not contest the plaintiff's claim and stated that he was unnecessarily impleaded as a party defendant.

5. The main contesting party was the defendant 2. According to him, the sale deed dated 26th December 1959 was a nominal transaction executed as a collateral security for a loan of Rs. 7,000/- and Rs. 1,000/- as interest thereon for three years, which was not intended to be acted upon. He further pleaded that it was verbally agreed between him and the transferee that, within 3 years, the latter would upon repayment of the loan, re-transfer the house. He also claimed that he was all along in possession of the house and that the defendant 1 was in its occupation as his tenant. He traversed all other averments in the plaint.

6. The defendant 1 pleaded that he was inducted as a tenant of the defendant 2, that he recognized the defendant 2 as his landlord and paid rent to him and that he was not liable to be evicted at the instance of the plaintiff. According to the defendant 1, it was in the year 1962 that a house belonging to one Abdul Kadir was allotted to him by the Rent Controlling Authority and the disputed house was likewise allotted to one R. S. Shrivastava, a marketing inspector, and thereafter the two allottees exchanged the houses thus allotted to them with the consent of the owners. The defendant 1 further claimed that, in 1965 the disputed

house was allotted to him. In conclusion he stated that he was willing to pay rent to the plaintiff if he be found to be the owner of the house.

7. On the main point in controversy, the Additional District Judge found against the defendant 2. The Judge, however held that the defendant 1 took possession of the disputed house in the circumstances pleaded by him and that, in 1965, that house was actually allotted to him. According to the conclusions reached by the learned Judge, the plaintiff did not require the house for his residence as pleaded by him but the defendant 1 was liable to be evicted on the ground that the allotment order passed in his favour was illegal.

8. The main question for consideration in these appeals is whether the sale deed dated December 26, 1959 was, by agreement, a nominal transaction not intended to be acted upon and executed only to serve as collateral security for a loan. According to Ramjilal D. W. 5, the contracts relating to the sale and the loan of Rs. 7,000/- were settled in his own house with Ramdas P. W. 2, when none else was present. On this point, there is only the unsupported direct evidence of Ramjilal D. W. 5, which is contradicted by the evidence of Ramdas P. W. 2. What is more, Ramjilal D. W. 5 did not say in his evidence that there was any agreement to the effect that the sale would be nominal or that it would not be acted upon. On the other hand, he expressly stated that he had a right to obtain reconveyance of the house within 3 years upon payment of the amount (Para. 13). This statement militates against the plea that the sale was nominal or was not intended to be acted upon. Further, Ramjilal D. W. 5 admitted that, in July-August 1960, he had learnt that Ramdas P. W. 2 was trying to sell away the house. In view of that fact, Ramjilal D. W. 5 was expected, consistently with his present stand that the sale deed executed by him was not intended to be acted upon, to take appropriate steps to prevent Ramdas P. W. 2 from so doing. Against this, Ramjilal D. W. 5 approached Ramdas P. W. 2 and remained content with asking him why he was trying to sell the house before the expiry of 3 years as provided by the contract. Nay, on January 11, 1961, Ramjilal D. W. 5 admittedly executed in favour of Ramdas P. W. 2 two documents, Exs. P-7 and P-8, which contra-indicate that the sale deed was merely nominal. By Ex. P-7, Ramjilal

D. W. 5 accepted making a payment of Rs 240/- as twelve months rent, which he had realised from the tenant, to Ramdas P. W. 2, to whom he acknowledged having sold the house by the deed dated December 26, 1959. By Ex. P-8, Ramjilal D. W. 5 purported to intimate to the tenant that the rent be paid to the transferee Ramdas P. W. 2. It would appear that, despite the sale deed executed by Ramjilal D. W. 5, he had continued to recover rents from the tenant. By these documents, he made amends and facilitated recovery of future rents by Ramdas P. W. 2. The explanation given by Ramjilal D. W. 5 that he executed these two documents, which were nominal only, on the insistence of Ramdas P. W. 2 with a view to inducing him not to sell the house before the expiry of 3 years is altogether unconvincing and appears to be one that has been improvised to explain away telling evidence. If, as now claimed, Ramdas P. W. 2 had no right or title to sell that house of large value and the house admittedly stood in danger of being sold away by him, we are satisfied that Ramjilal D. W. 5 would have behaved very differently.

9 Again, in view of the endeavours made by Ramdas P. W. 2 to sell the house, Ramjilal D. W. 5 would have taken the earliest opportunity to repay the loan and obtain a reconveyance. But he admitted that, although he had money in 1962 and 1963, he made no endeavour whatsoever to do so and did not even serve on Ramdas P. W. 2 a notice of demand.

10. Further, Ramjilal D. W. 5 would not have remained inactive and inarticulate at least after knowing that the house had been sold to the plaintiff. At first, Ramjilal D. W. 5 resorted to a falsehood by saying that he did not know about the sale until election pamphlets were issued in the general elections of the year 1967. It is not without significance that, in reply to one of those pamphlets, he stated in Ex. P-15 dated February 4, 1967 that he had mortgaged the house with Ramdas P. W. 2. However, when his attention was drawn to his evidence given in Civil Suit No. 2-B of 1963 on October 22, 1963, he stated:

"Even after knowing that Ramdas had sold the house, I did not give to Ramdas any notice. I continued to speak to him (about this) verbally. To the plaintiff also, I did not give any notice."

It would appear from his evidence (Ex P-25) that he had claimed in that

suit that the amount of loan was not repayable before the house was reconveyed. The claim was, however, decreed on October 24, 1963. Even thereafter, Ramjilal P. W. 5 took no steps to get the house reconveyed to him. In our opinion, the conduct is not consistent with the genuineness of the defence now made.

11. The claim that there was a real sale in favour of Ramdas P. W. 2 is vigorously attacked on the ground that there is no reliable evidence to show that he paid the consideration Rs 8,000/- to Ramjilal D. W. 5. The lower Court too has characterised the unsupported evidence of Ramdas P. W. 2 on the point to be unconvincing. In doing so, it did not duly consider the fact accepted by Ramdas P. W. 2 (Paragraph 3) and Ramjilal D. W. 5 (Paragraph 12) that they were on intimate terms. In our opinion, in appreciating the evidence, both direct and circumstantial, due regard must be had to that important fact. There is evidence to show, and Ramdas P. W. 2 also accepted, that he was not present when the sale-deed dated December 26, 1959, was executed by Ramjilal D. W. 5 and got registered by him. Ramdas P. W. 2 explained that, on that date, he had gone to the registration office but, on account of high fever, he paid the consideration Rs. 8,000/- to Ramjilal D. W. 5 and left the place. In view of the fact that the two were close friends, this should not be regarded as altogether incredible. In any event, Ramjilal D. W. 5 admitted receipt of full consideration in the sale deed and the burden lay heavily on him to explain the admission and prove non-receipt of consideration. Chandra Kanwar v. Narpal Singh (1907) I L R 29 All 184 (PC).

12. According to Ramjilal D. W. 5, he had asked Ramdas P. W. 2 for a loan of Rs. 7,000/- and the latter then stated that, since the amount was large, he would advance the loan if a sale deed of the disputed house be executed in his favour for Rs. 7,000/- principal and Rs. 1,000/- interest, repayable in 3 years. Continuing, Ramjilal D. W. 5 said that, about 8 or 10 days later, he, on his own, executed and got registered the sale-deed dated December 26, 1959 without receiving any consideration and that, it was on January 16, 1960 that he called to his own house Ramdas P. W. 2, took Rs. 7,000/- from him, executed in his favour a promissory note for that amount and delivered the sale-deed to him. We have mentioned

elsewhere in this judgment that Ramjilal D. W. 5 claimed that none else was present when the earliest talk took place. The witness had, however, made a contrary statement in Ex. P-25 and named one Dwarka Prasad Tiwari to have been present on that occasion. He was not examined in this case, presumably because he would not have supported the defence. Again, we are unable to accept the argument that Ramjilal D. W. 5 was unlikely to have needed or taken two large amounts, Rs. 8,000/- on December 26, 1959 and Rs. 7,000/- on January 16, 1960, in quick succession. He admitted having taken a contract worth Rs. 30,000/- or Rs. 35,000/- and requiring for payment to workers Rs. 5,000/- or so every month. It is not, therefore, surprising that he raised these two sums at an interval of about three weeks. Further, if the loan of Rs. 7,000/- was given on interest terms for three years, one would expect those terms to be incorporated in the document evidencing the loan. Not only those terms are not there, but they are not also in the sale-deed. When asked to explain this, Ramjilal D. W. 5 had stated earlier as follows:

"The consideration written in the sale deed is Rs. 8,000/- but the disputed hand-note dated 16-1-60 is written for rupees 7,000/-. Why this is so I do not know." (Ex. P.-25).

In our opinion, the evidence of Ramjilal D. W. 5 on this point, which is wholly unsupported, is unnatural and unconvincing. As shown, his subsequent conduct is also inconsistent. We are, therefore, unable to accept that he has discharged the burden of showing that he did not receive the consideration for the sale-deed executed by him.

13. An endeavour was made to show that, on the date when the sale-deed was executed, the value of the house was Rs. 18,000/- or Rs. 19,000/-. On this point, there is only the ipse dixit of Ramjilal D. W. 5 which is contra-indicated by his own witnesses Shyamsunder D. W. 8 and Dr. Bramhanand D. W. 9. If there were any truth in that submission, there could be, we think, no dearth of relevant evidence.

14. Reliance is also placed upon the fact that possession of the house, which was in occupation of a tenant, was not delivered to Ramdas P. W. 2. It is true that, for a time, Ramjilal D. W. 5 continued to recover rents from the tenant but, as we have shown, he subsequently

made amends, handed over the rents recovered by him to Ramdas P. W. 2 and also gave a letter asking the tenant to pay the future rents to the transferee. It was after this that Ramdas P. W. 2 got his name mutated in municipal records (Ex. P-22) and started paying municipal taxes (Ex. P-2). It is clear from Ex. P-7 that Ramjilal D. W. 5 had realised the rents up to the end of the year 1960 and then paid the rents so recovered to Ramdas P. W. 2. That being so, the statement of the tenant V. P. Tiwari D. W. 2 to the effect that he paid the rent for January 1960 to Ramjilal D. W. 5 and the production of the receipt Ex. D-6 to that effect are not of much value. It is, however, significant that V. P. Tiwari D. W. 2 did not produce any receipt subsequent to Ex. P-7 dated January 11, 1961 to show that he had continued to pay rent to Ramjilal D. W. 5. Further, he appeared without summons at the instance of Ramjilal D. W. 5 with whom he seems to have become familiar. In the circumstances, we prefer to rely upon the evidence of Ramdas P. W. 2 to the effect that, after 1960, he recovered the rents from V. P. Tiwari D. W. 2.

15. After V. P. Tiwari D. W. 2 vacated the disputed house at the beginning of June 1962, it was allotted to R. S. Shrivastava D. W. 7, a brother-in-law of the defendant 1 (Ex. P-1). The new tenant stated that he occupied it soon afterwards and remained there for five months at the end of which he claimed to have exchanged it for the house of one Abdul Kadir which his brother-in-law (defendant 1) was occupying. He said that, during this period, he paid rents of the house to Ramjilal D. W. 5. He could not, however, produce a single receipt. He admitted that he used to take rent receipts from Abdul Kadir and we see no good reason why he did not do so from Ramjilal D. W. 5. Therefore, on this point we do not accept his evidence or that of his brother-in-law, Anand Kumar D. W. 1, who, as the defendant 1, is materially interested in this suit. In the result, we find the contention that Ramdas P. W. 2 was not at all in possession of the house to be not well founded. The facts noticed by us in paragraph 14 above contra-indicate that the sale in favour of Ramdas P. W. 2 was nominal only or that it was not intended to be acted upon.

16. The passing of consideration for the sale dated December 5, 1962, has been proved by Vijai Kumar P. W. 1, Ramdas

P. W. 2 and Bhagechand P. W. 7. The defendants 1 and 2 sought to challenge this consideration, but it is well established that, being third parties, it is not open to them to do so.

17. We do not agree with the lower Court that a collateral agreement between the parties that a sale-deed executed by one of them would be nominal and would not be acted upon is hit by Ss. 91 and 92 of the Evidence Act and cannot be proved. We have, therefore, considered the entire evidence, both direct and circumstantial, in support of the alleged agreement and we affirm the lower Court's conclusion that there was no agreement that the sale-deed dated December 26, 1959, would be a nominal transaction not intended to be acted upon or which was executed merely as a collateral security for a loan of Rs. 7,000/- and interest Rs. 1,000/-. We also affirm the further conclusion of the lower Court that there was no agreement to reconvey the disputed house within 3 years upon repayment of Rs. 8,000/-.

18. In view of the conclusion that the sale in favour of Ramdas P. W. 2 was good and valid, and not merely nominal, it is unnecessary to consider whether the plaintiff is a bona fide purchaser for value without notice though, in our view, even that claim would not be unsustainable in the circumstances of the case. In the result, therefore, the appeal filed by Ramjilal D. W. 5 (defendant 2) must fail.

19. So far as the appeal filed by Anand Kumar D. W. 1 (defendant 1) is concerned, that has no merit at all. The rent of the house in dispute was Rs. 20/- per month and, in view of section 39 (5) of the M. P. Accommodation Control Act, 1961, it could not be allotted even to H. S. Shrivastava D. W. 7. The defendant 1 apparently occupied it towards the end of 1962 and, as claimed by him, he had taken the consent of the defendant 2. But the defendant 2 then had no right or title to the house and he could not induct any new tenant. The allotment order made in 1965 in favour of the defendant 1 was altogether illegal for several reasons, including the one that he was not then entitled to get the benefit of such an order under section 39 (2) of the M. P. Accommodation Control Act, 1961. He was, therefore, no better than a trespasser occupying the house without lawful authority. As we have shown, the defendant 1 was not, and could not be, a tenant of the plaintiff. It may be contend-

ed, though it was not so argued before us, that, by serving a notice to quit on Anand Kumar D. W. 1, the plaintiff recognised him as a tenant. In our view, this could not be unilateral because even thereafter, Anand Kumar D. W. 1 refused to consider himself as the plaintiff's tenant. So he stated in paragraph 3 of his written statement:

"For this reason, he never regarded, or could regard, himself as plaintiff's tenant". Even if Anand Kumar D. W. 1 could be regarded as a tenant, he had, in 1963, denied the plaintiff's title and stated that he would pay rent to the owner of the house mentioned in the allotment order namely, Ramjilal D. W. 5 (Anand Kumar P. W. 1, paragraph 4). By the notice Ex. P-16 dated April 8, 1967, the tenancy was, in view of the denial of the plaintiff's title, forfeited and determined. It is hardly necessary to add that disclaimer of title by the tenant is a ground for eviction included in Cl. (c) of S. 12 (1) of the Madhya Pradesh Accommodation Control Act, 1961: *Ghulam Mohammad v. Pooranchand*, S. A. No. 16 of 1967 D/- 16-11-1967 (M. P.). Finally, the contention that the defendant 1 could not deny the title of his landlord is a principle which applies only to a suit brought by the landlord against his tenant whom he had inducted in possession of the demised premises. It is of no avail to the tenant when the real owner of those premises brings a suit for possession against the landlord as well as his tenant. For all these reasons, this appeal filed by the defendant 1 also must fail.

20. Before closing, we may add that another point was argued in support of the appeal.

21. In the result, the two appeals are dismissed. Costs of this Court shall follow that event. Other costs as directed by the lower Court. Hearing fee according to schedule.

Appeals dismissed

1970 ORI L. J. 1180 (Vol. 76, C. N. 292)

(MADHYA PRADESH HIGH COURT)

S. M. N. RAINA, J.

Panna Fodaliya, Appellant v. The State of Madhya Pradesh, Respondent.

Criminal Appeal No. 243 of 196 D/- 24-10-1969, from order of 2nd Add S. J., Bhind, D/- 16-10-1968.

BN/CN/A 694/70/CWM/D

Criminal P. C. (1898), S. 161 (3) — Examination of witness by police — Record of statement—Failure to record statement of solitary eye witness—Effect.

It is the duty of an Investigating Officer to record the statements of eye-witnesses and of other material witnesses. In a case where there is a solitary eye-witness there can be no justification whatsoever for not recording his statement and the conduct of the Investigating Officer in the absence of any plausible explanation must be viewed with suspicion. (Para 8)

By not recording the statement of a solitary eye-witness during investigation the accused is denied a very valuable opportunity of testing the veracity of the witness with reference to his earliest version, and, therefore, it is difficult to attach any weight or value to the statement of such witness in Court. (Para 10)

Cases Referred : Chronological Paras
(1964) AIR 1964 All 481 (V 51) =
1964 (2) Cri L J 497, Gopal-
krishna v. State 8

J. P. Gupta, for Appellant; B. L. Mourya, Dy Government-Advocate, for Respondent.

JUDGMENT. — This is an appeal by Parma aged about 25 years who has been convicted and sentenced to rigorous imprisonment for 10 years under S. 307, Penal Code by the Second Additional Sessions Judge, Bhind.

2. Appellant Parma is a resident of mouza Bhat Pura which is at a distance of about 2 to 3 miles from mouza —Litiyapura, Fodalia, father of the appellant and Hubba, cousin of the appellant owned some agricultural land in mouza Litiyapura. They sold the land to deceased Sobran and his cousin Mahadeo (P. W. 5) Fodalia wanted this land to be sold back to him, but Sobran and Mahadeo declined. This led to a quarrel and also litigation between the parties. Doji is the elder brother of the appellant Parma.

3. The case of the prosecution is that on account of the aforesaid dispute over the land Doji wanted to take revenge on Sobran and Mahadeo. He, therefore, absconded from the village and joined a gang of dacoits led by Madhosingh. On 15.10.67, appellant Parma brought a gang of dacoits to village Litiyapura. Some of them went to the houses of Mahadeo (P. W. 5), some to the house of deceased Raghunath and others to the house of Sobran. Parma appellant, who was armed with a gun fired at Raghunath, Ramswarup and Jagdish.

Raghunath and Ramswarup were killed while Jagdish sustained a grievous injury. Sobran and Sardarsingh were shot dead by other dacoits. According to the prosecution the appellant abetted commission of their murder.

4. The appellant was thus tried on a charge of murder of Raghunath and Ramswarup under S. 302, Penal Code and of abetment of murder of Sardarsingh and Sobran under S. 302 read with S. 114, Penal Code. He was also tried on a charge under S. 307, Penal Code for attempting to commit murder of Jagdish under S. 307, Penal Code. The appellant abjured his guilt and his defence was that he was not at all present at the spot. The trial Court acquitted the appellant of the charges of murder as well as of the charge of abetment of murder, but convicted him of an offence under S. 307, Penal Code for attempting to commit murder of Jagdish. Being aggrieved thereby the appellant has preferred this appeal.

5. It is clear from the evidence on record that on the date of occurrence the dacoits visited village Lityapura, armed with guns and shot dead four persons, namely—Sardar Singh, Sabran, Raghunath and Ram Swarup while Jagdish sustained a grievous injury. The fact that Jagdish sustained a gun-shot wound is also borne out by the evidence of Dr. Jain (P. W. 12).

6. I need not discuss this evidence at length because the fact that Jagdish sustained a gun shot wound at the time of occurrence has not been disputed.

7. The main question for consideration in this appeal is whether the appellant had fired at Jagdish and caused the injury found on his person. The solitary witness on this point is Jagdish himself and we have to consider whether his testimony can be safely relied upon. We have to bear in mind that Jagdish (P. W. 8) is a young boy aged 13 years and it was night time. Jagdish admitted in cross-examination that there was no light except the moon-light. There must have been a lot of confusion and consternation when the dacoits arrived, and therefore, it is necessary to see if Jagdish could properly identify the person who shot him

8 It no doubt appears that the appellant was known to Jagdish but the learned counsel for the appellant pointed out that in this case the Investigating Officer did not record the statement of Jagdish at any stage, and therefore, the appellant was deprived of an opportunity to cross-examine Jagdish with reference to his

earliest version The Sub-Inspector Ram Naresh Singh (P. W. 10) who investigated this case was unable to offer any explanation for not recording the statement of Jagdish. In paragraph 3 of his statement he stated as under :—

“मैं जगदीश का बयान नहीं लिया इसकी कोई खास वजह नहीं बता सकता.”

In *Gopal Krishna v. State*, AIR 1964 All 481, it was observed as under in paragraph 22 :—

“It is obvious that though the police are not bound to make a record of the statement of the witnesses under S. 161 as a matter of obligation, it is their duty to do so when the witness is a material witness for unfolding the prosecution story. It is also clear that a failure on their part to comply with the requirements of section 161 (3), though does not render the subsequent statement of the witness at the trial inadmissible, it does greatly impair the value of the evidence of that witness. I fully agree with this view. It is the duty of an Investigating Officer to record the statement of eye-witnesses and of other material witnesses. In a case like this where there is a solitary eye-witness there can be no justification whatsoever for not recording his statement and the conduct of the Investigating Officer in the absence of any plausible explanation must be viewed with suspicion.”

9. Learned counsel for the appellant urged that it is very likely that although the statement of Jagdish was recorded by the Investigating Officer, it is being suppressed because it is not in favour of the prosecution. This contention cannot be said to be without force in the circumstances of this case.

10. By not recording the statement of Jagdish during investigation the appellant has been denied a very valuable opportunity of testing the veracity of the witness with reference to his earliest version, and, therefore, it is difficult to attach any weight or value to the statement of Jagdish in Court.

11. Learned counsel for the appellant further pointed out that although according to Jagdish (P. W. 8), Mahadeo (P. W. 5) and Siyaram (P. W. 6) were present nearby at the time of occurrence (vide paragraph 4 of his deposition), both Mahadeo and Siyaram do not even mention the presence of appellant Parma among the miscreants. This is very significant and makes it all the more unsafe to

place any reliance on the testimony of Jagdish.

12. There are two other features of the case, which are pertinent to note in this connection. The name of appellant Parma is not mentioned in the first information report (Ex. P 10), although it was lodged by Rahim Khan on information furnished by Mahadeo who appears to have seen the miscreants in action. Further, from the note 6 in the spot map (Ex. P 5) it appears that the case of the prosecution was that Jagdish was hurt by the same shot which was fired at deceased Raghunath, because the bullet after passing through his body hit Jagdish and caused him the injury found on his person. The appellant was tried on a charge of murder of Raghunath and the trial court after carefully considering the evidence on the point observed in paragraph 23 that there was no evidence to show that the appellant Parma shot at and killed Raghunath Singh. The appellant was, therefore, acquitted of the charge of murder of Raghunath Singh and the State Government have not filed any appeal against his acquittal. If the appellant did not fire at Raghunath Singh and caused his death, it would appear that he was also not responsible for causing the injury to Jagdish in view of the aforesaid case of the prosecution. Jagdish also could not say, who shot and killed Raghunath. In these circumstances, it is extremely doubtful, if he could see the person who shot at him. It is not unlikely that the appellant is being implicated because he is the brother of Doji, who joined the gang of dacoits and participated in the commission of these offences along with the dacoits.

13. Thus, after a careful consideration of the entire evidence on record I find that it is extremely unsafe to place any reliance on the sole testimony of Jagdish (P. W. 8) and therefore hold that the prosecution has failed to establish the charge under S. 307, I. P. C., against the appellant beyond reasonable doubt.

14. The appeal is, therefore, allowed and the appellant is acquitted of the offence under S. 307, I. P. C., for attempting to commit the murder of Jagdish. His conviction and sentence are hereby set aside. He shall be set at liberty forthwith unless required in any other case.

Appeal allowed.

1970 CRI. L. J. 1183 (Vol. 76, C. N. 293)

(MADRAS HIGH COURT)

KRISHNASWAMY REDDY J.

Murugesan and others, Petitioners-
Accused v. Kothandam, Respondent-
Complainant.

Criminal Revn. Case No. 175 of 1969
(Criminal Revn. Petn. No. 174 of 1969)
D/- 6-11-1969.

Criminal P. C. (1898), Ss. 156 (3), 173—
Complaint — Magistrate directing police
to investigate under S. 156 (3) and submit
report under S. 173 — Second complaint
filed by complainant in respect of same
facts alleged in the first complaint —
Magistrate cannot take cognisance of the
second complaint without calling for the
report from police to be submitted by
them under S. 173

Where in respect of a complaint after
the Magistrate has directed Sub-Inspector
of Police to investigate under S. 156 (3)
and submit a report under S. 173, no final
report is submitted under S. 173 and if in
the meanwhile second complaint is filed
by the complainant in respect of same facts
alleged in the first complaint then taking
cognisance, by the Magistrate, of the
second complaint, without calling report
from police to be submitted by them
under S. 173, and applying his mind to
it to take further action in the matter
will amount to abuse of process. (Para 6)

The very object of the magistrate having
directed the police officer to investigate
the complaint presented to him is to have
full details in respect of the allegations
made in the complaint to examine the
witnesses in the course of such investi-
gation and to do all other things that the
Investigation Officer is empowered to do
so that the Magistrate before taking cog-
nizance of the case, will have sufficient
materials collected in the course of the
investigation. Otherwise, the order made
by the Magistrate for investigation by
the police will have practically no effect
at all. No doubt, the Magistrate has got
discretion, after obtaining the report from
the police officer under S. 173, either to
accept the report or if he differs from the
report of the police officer, to take appro-
priate action. But when he thinks fit at
the first instance when the first complaint
is filed that it should be investigated by
the police officer under S. 156 (3), there
is no justification for him to change his
mind without calling for a report and
looking into it, and take cognizance of

the second complaint on the same mate-
rials. (Para 6)

C. K. Venkatanarasimhan, for Peti-
tioners, J. S. Athanasius, for L. Vedapuri,
for Respondent; Addl. Public Prosecutor,
for State.

ORDER. — This petition has been filed
by Accused 1 to 3 in C C. No. 3792 of
1938 on the file of the Sub-Magistrate of
Tindivanam, to quash the proceedings
before the said Magistrate against them
on the ground that the second complaint
on which the learned Magistrate had
taken cognisance of the case, is not main-
tainable.

2. The brief facts of the case are these:
The respondent filed a private complaint
against the three petitioners under Ss. 355
and 341, I. P. C., in respect of an occur-
rence which took place in Tindivanam at
about 8.30 p.m. on 3-10-1968. The com-
plaint was filed on 4-10-1968. The learned
Sub-Magistrate on the same day noted in
the petition of the complainant itself
that it disclosed the commission of the
offence under Ss. 341 and 355, I. P. C.,
which were cognisable. He, therefore,
forwarded the complaint to the Sub-
Inspector of Police, Tindivanam for in-
vestigation under S. 156 (3), Criminal
P. C., and report under S. 173 (2), Crimi-
nal P. C., on or before 18-10-1968. The
Sub-Inspector, Tindivanam, investigated
the case but had not submitted his report
under S. 173, Criminal P. C., to the Sub-
Magistrate. It appears that the police had
sent a notice to the respondent on 8-11-
1968 informing him that there was no
material to proceed further in the matter.
On receipt of this notice, the respondent
filed a second complaint making the same
allegations found in the earlier com-
plaint on 8-11-1968. The learned Sub-
Magistrate asked the Head clerk to put
up the R. C. S. (referred charge sheet) on
the same day. A note was put up that no
report was received from the police on
the first complaint, on the same day. The
learned Sub-Magistrate returned the com-
plaint to the respondent on the ground
that no final report from the Sub-Inspector
was received in respect of his earlier
complaint and directed him to re-present
the complaint after 18-11-1968. It appears
that no steps were taken to remind the
Sub-Inspector of Police to send the report.
On 20-11-1968, the respondent represented
the complaint and again it was returned
to the respondent with an endorsement
that the final report was not received
from the police and the complaint might

again be re-presented after 23-11-1968. Even after this, there was no reminder to the police, nor the police had submitted the report. The respondent re-presented again the complaint on 30-11-1968. On 30-11-1968, the Sub Magistrate took a sworn statement from the respondent and took the case on file under S. 355, I P. C., against the first petitioner and under S. 341, I P. C., against petitioners 2 and 3 and posted the case on 10-12-1968 for the appearance of the petitioners. On the summons issued to the petitioners, they appeared through their advocate and filed an objection on 4-1-1969 stating that the process issued to the petitioners was not in order as the report from the police officer was not received in respect of the same complaint and requested the Court not to proceed with the hearing of the case without taking action on the police report to be submitted by them. The sub-Magistrate, on the objection petition, made the following note :

"The S. H. O. (Station House Officer) concerned has not sent in his report so far. The complainant has been served with refer notice and he has filed it with his present complaint. Hence issue of summons to the accused is in order."

Against this order, this petition has been filed.

3. The learned counsel for the petitioners submitted that the order of the lower Court taking cognisance of the second complaint on the same facts before finally passing an order on the first complaint was contrary to law and without jurisdiction and further submitted that the lower Court should have obtained the report from the police and applied its mind to the materials disclosed in the investigation and taken appropriate action on such a report in respect of the first complaint itself. It was further contended that after having directed the police to investigate the case under S. 156 (3), Criminal P. C., the Magistrate must have followed the procedure of taking action under Chap 14 and as provided under S. 173, Criminal P. C.

4. The undisputed facts for the purpose of appreciating the contentions of the learned counsel for the petitioners are these. In respect of the complaint filed by the respondent on 4-10-1968, the Magistrate had directed the Sub Inspector of Police, Tiruvananthapuram, to investigate under S. 156 (3), Criminal P. C., and submit a report under S. 173, Criminal P. C. The investigation was accordingly done

by the Police officer under Chap. 14, Criminal Procedure Code. No final report was submitted under S. 173, Criminal P. C. to the Sub-Magistrate. In the meanwhile, a second complaint was filed by the respondent in respect of the same facts alleged in the first complaint and the Magistrate took cognisance of the case after taking sworn statement from the respondent and issued process to the petitioners. The Sub Magistrate had not taken steps to insist upon the report by the police before he took cognisance of the case under the second complaint. Till now, the police have not filed a report under S. 173, Criminal P. C.

5. The question, therefore, now is whether the Magistrate was right in taking cognisance of the second complaint on the same facts without calling for the report from the police to be submitted by them under S. 173, Criminal P. C. and applying his mind to it to take further action in the matter.

6. We are not concerned with the question whether the Magistrate had power before cognisance of the complaint to direct the police officer to investigate under S. 156 (3), Criminal P. C. Once the Magistrate exercised his powers under S. 156 (3), Criminal P. C., and directed the police to submit a report under S. 173, Criminal P. C., the Magistrate should insist upon the police officer for submitting the report under S. 173, Criminal P. C., before taking further action in this matter. The investigation was done by the police under Chap. 14, Criminal P. C., which should ultimately result in the submission of a report under S. 173, Criminal P. C. The relevant provision of S. 173, Criminal P. C. reads thus :

"(1) Every investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is completed, the officer in charge of the police station shall (a) forward to a Magistrate empowered to take cognisance of the offence, on a police report, a report in the form prescribed by the State Government setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in the custody, or has been released on his bond, and, if so, whether with or without sureties and (b) communicate, in such manner as may be prescribed by the State Government, the action taken by him to the

person, if any, by whom the information relating to the commission of the offence was first given."

It is, therefore, clear that in an investigation done under Chap. 14 of the Criminal P. C. as soon as such investigation is completed, the officer in charge of the police station shall submit a report with the particulars mentioned in S. 173 (1) (a) to the Magistrate empowered to take cognisance of the offence on a police report under S. 190 (b), Criminal P. C. The very object of the Magistrate having directed the police officer to investigate the complaint presented to him was to have full details in respect of the allegations made in the complaint to examine the witnesses in the course of such investigation and to do all other things that the Investigating officer is empowered to do, so that the Magistrate before taking cognisance of the case, will have sufficient materials collected in the course of the investigation. Otherwise, the order made by the Magistrate for investigation by the police will have practically no effect at all. The Magistrate must have insisted upon getting a report under S. 173, Criminal P. C., from the police. It is clear from the records that the Magistrate has not at all taken steps to insist upon the Police officer to submit the report. I am of the view that, before the report was submitted, the entertainment of a second complaint in respect of the same facts which was the subject matter of the investigation by the police, will amount to abuse of process. What the magistrate should have done in this case is that before taking cognisance of the second complaint, he should have insisted upon the police officer for submitting his report under S. 173, Criminal P. C. and after obtaining the report, considered the facts disclosed in the investigation and taken necessary action on that report itself. The Magistrate has got discretion, after obtaining the report from the police officer under S. 173, Criminal P. C. either to accept the report or if he differs from the report of the police officer, to take appropriate action. It is true, that a notice was served on the complainant by the police officer who was in charge of the investigation and that there was no material to proceed further in the matter and on that the complainant filed the second complaint. So far as the Magistrate is concerned, when he thought fit at the first instance when the first complaint was filed that it should be investigated by the police officer under

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S. 156 (3), Criminal P. C., there is no justification for him to change his mind without calling for a report and looking into it, and take cognisance of the second complaint on the same materials. I, therefore, hold that the cognisance of the second complaint and the issue of process to the revision petitioners, in the circumstances of this case, will amount to abuse of process. I, therefore, quash the proceedings in C. C. 3792 of 1968 pending on the file of the Sub-Magistrate, Tindivanam. The Sub-Magistrate is directed to call for the report from the police officer who was directed to investigate the case and dispose it of according to law.

7. The revision petition is allowed with the above observations.

Petition allowed.

1970 CRI. L. J. 1185 (Vol. 76, C. N. 294)
(MADRAS HIGH COURT)

KRISHNASWAMY REDDY, J.

T. R. Subbaraman and others, Petitioners v. State by Inspector of Police and another, Respondents.

Criminal Misc. Petn. No. 3311 of 1968 in Cri. App. No. 332 of 1968, Cri. M. P. No. 759 of 1969 in Cri. App. No. 786 of 1968 and Cri. M. P. No. 2070 of 1969 in Cri. App. No. 366 of 1968, D/- 3-9-1969.

Constitution of India, Art. 311 (2) and Proviso (a) — Conviction recorded by competent court on criminal charge — Until set aside in appeal or revision such conviction remains effective — Such conviction can be made basis of dismissal, removal or reduction in rank of public servant.

Proviso (a) to Art. 311 refers to conviction resulting on a criminal charge on the ground of the conduct of the person convicted. Once a conviction is recorded by a competent court of law against a person and where his conduct is involved, such conduct is being gone into in full by the trial court and, therefore, such conviction by a criminal court is itself taken as basis for the punishment provided under Cl. (2) of Art. 311 without any further enquiry.
(Para 6)

Conviction begins to operate as soon as it is recorded. It subsists till it is set aside by an appellate court or a court of revision. What is contemplated in proviso (a) to Art. 311 (2) is a subsisting conviction or a conviction in force. In an appeal or

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".... under the Indian law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is merely one of dismissal. There is nothing in the Indian law to warrant the suggestion that the decree or order of the Court or tribunal of the first instance becomes final only on the termination of all proceedings by way of appeal or revision. The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective."

The same principle will apply to the conviction by a criminal Court of the first instance.

9. There cannot be any doubt, if action is taken under cl. (2) of Art. 311, based on a conviction on a criminal charge and if such conviction is set aside either on appeal or revision, such an order ceases to have effect even from the time of conviction by the trial Court as the conviction becomes non est the very moment it is set aside. But, however, there is no bar for the authorities to take action under cl. (2) of Art. 311, on the basis of a conviction by the trial Court without waiting for the result in an appeal or a revision even if such an appeal or revision is pending. It is of course for the authorities to decide whether they should take action under cl. (2) of Art. 311 immediately after conviction by the trial Court or wait for the result of a possible appeal or revision. Such considerations will depend upon the expediency in the interests of justice in a particular given case. The following cases were cited before me by the learned counsel for the petitioners—*Dilbagh Raj v. Divl. Supdt. Northern Rly.*, AIR 1959 Punj 401, Divl. Supdt., *Northern Rly. v. Ram Saran*, AIR 1961 All 336, *Union of India v. R. Akbar Sheriff*, AIR 1961 Mad 486; *Dhanjiram v. Union of India*, AIR 1965 Punj 153.

10. The above decisions do not have a bearing on the point raised in these petitions. These are cases where the authorities contend that once action was taken under cl. (2) of Art. 311 on the basis of a conviction by trial Court, such action cannot be questioned even if such conviction was subsequently set aside on appeal or revision. It was held in all these cases that once the conviction is set aside, the conviction ceased to operate even from the date of such conviction by the trial Court. In these cases, the power of the authorities to take action under

Art. 311 (2) on the basis of conviction by the trial Court was not questioned.

11. It is worthwhile to note the rules made by the Madras Government under Art. 309 of the Constitution. Though under proviso (a) to Art. 311 (2), it was not necessary to give an opportunity to the concerned person before taking action under cl. (2) of Art. 311 to hear his representation, R. 17 (c) (1) (1) of the Madras Civil Services (Classification, Control and Appeal) Rules provides that the person against whom action is taken on the basis of conviction shall be given a reasonable opportunity of making any representation that he may desire to make and such representation, if any, shall be taken into consideration before the order imposing the penalty is passed. This provision confers an advantage to the person against whom action is taken, so that he might make representation in respect of the penalty to be imposed on him. By virtue of this clause, it appears that show cause notices were given to the petitioners before taking action.

12. In the result, I find that the action taken by the authorities against the petitioners is perfectly justifiable under law. The petitions are, therefore, dismissed. The appeals may be expedited for hearing.

Petitions dismissed.

1970 CRI. L. J. 1188 (Vol. 76, C. N. 295)

(MYSORE HIGH COURT)

C. HONNIAH J.

Devendrappa and another, Petitioners
v. The State of Mysore, Respondent.

Criminal Revn. Petn. No. 119 of 1969,
D/- 17-12-1969, against judgment of S. J.
Dhaiwar, D/- 30-12-1968.

Penal Code (1860), S. 95 — Even intentional causing of harm is excused because of its triviality — Word "harm" includes injury to mind, body or property — (Words and Phrases — "Harm").

The law does not in S. 95 of Penal Code concern itself with matters too trivial to demand its notice about which men in their ordinary frame of mind do not complain. Even the intentional causing of harm specified in that section is excused because of its triviality. The word 'harm' no doubt means injury of any kind, including injury to mind, body or property. In the normal circumstance even if the

injury to mind, body or property is caused and if the harm is so trivial, no person of ordinary sense and temper would complain of it. (Para 6)

Section 95, I. P. C. is intended to exempt from criminality offences which, from their triviality, do not deserve the name of crimes even though in one sense they are crimes because they fall within the definition of crimes, and, but for this section, the said crimes are punishable. (Para 8)

B. V. Deshpande, for Petitioners;
G. Dayanand, High Court Govt. Pleader,
for Respondent.

ORDER—The petitioners were charged for having committed offences under Ss. 447, 504 and 323 read with S. 34 of the Indian Penal Code in the Court of the Judicial Magistrate, First Class (II Court), Hubli. The case of the prosecution was that the two petitioners trespassed into the land bearing R. S. No. 228 of Tadasa village in Dharwar District belonging to Thirakappa (P. W. 1) and caused hurt to him and his servant Ghouse Sab (P. W. 7) on 30-9-1967. The defence of the petitioners was that they and P. W. 1 had a right to take water from a tank to their lands which were adjoining each other; that on 29-9-1967 P. W. 1 had taken water to his land; that on the date of the incident when they went to the land in order to take water, they found P. W. 1 taking water to his land though he was not entitled to take water on that day. Therefore they diverted the flow of water to their land. In the meanwhile, according to them, P. W. 1 came there and stopped flow of water to their land. Thereafter, there was exchange of words between them and in that process one caught the other and there was a scuffle between them and thereafter they and P. W. 1 and his servant P. W. 7 went away from the field.

2. The prosecution has mainly relied on the evidence of P. W. 1 and P. W. 7 to prove their case. The petitioners did not examine any witness on their behalf. The learned Magistrate, after considering the evidence came to the conclusion that the prosecution has not made out a case against the petitioners for the offences under Ss. 323 and 504, I. P. C. and accordingly he acquitted them of those offences. However, he was of the view that the evidence established that the petitioners had committed offences punishable under Ss. 447 and 324, I. P. C. and accordingly he convicted them for those offences. He did not impose on them any substantial

sentence of imprisonment or fine, but released them under S. 4 (1) of the Probation of Offenders Act, directing them to execute a bond for Rs. 500/- each for good behaviour for a period of three years with a surety each. The petitioners, aggrieved by this decision, filed an appeal to the Court of the Sessions Judge, Dharwar. The learned Sessions Judge acquitted the petitioners of both the offences but convicted them under S. 323 read with S. 34, I. P. C. and reduced the period of probation to four months. This revision petition is directed against the order of the learned Sessions Judge.

3. The facts proved and admitted are these: P. W. 1 Thirakappa was the owner of the land bearing R. S. No. 228 of Tadasa village. The petitioners were the owners of the land adjoining to R. S. No. 228. It is admitted that both P. W. 1 and the petitioners were entitled to take water from a common tank to their lands. The evidence in this case shows that P. W. 1 had taken water to his land on the previous day. On the next day when the petitioners went to the land with a view to take water to their land, they found, P. W. 1 though had taken water to his land on the previous day, was continuing to take water on that day also. The incident admittedly took place in the afternoon. Therefore it is clear that P. W. 1 must have taken water to his land even on that day from morning.

4. The petitioners, who undoubtedly had a right to take water to their land, went near their land to take water. There is no evidence in this case that they went there knowing that P. W. 1 had continued to take water on that day also and with a view to commit any offence. But they went to their land in the usual course to take water to their land and there they found P. W. 1 taking water to his land. The petitioners therefore stopped the flow of water to the land of P. W. 1 and allowed the water to their land. At that point of time, P. W. 1 questioned the petitioners and in that behalf there was exchange of abuses between them. While this was going on, P. W. 7 who was working at some distance came to the rescue of P. W. 1. The evidence shows that A-1 rushed towards him and attempted to assault him with a sickle but P. W. 7 caught hold of A-1 and a scuffle ensued and in the process P. W. 7 sustained some scratches on the fore-arm. There is no evidence in this case that P. W. 1 had sustained any injuries at all.

5. On this evidence, it is difficult to hold that the petitioners, in furtherance of their common intention, assaulted P. W. 1 and P. W. 7 and thereby committed an offence punishable under S. 323 I. P. C., as held by the learned Sessions Judge.

6. Mr. Deshpande, learned counsel for the petitioners contended that on the facts proved by the prosecution itself the petitioners should not have been convicted even assuming that they had caused harm to P. W. 1 and P. W. 7 as it was slight. Section 95 of the Indian Penal Code is one under general exceptions (Chapter IV). It provides that.

"Nothing is an offence by reason that it causes, or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm."

The law does not in this section concern itself with matters too trivial to demand its notice about which men in their ordinary frame of mind do not complain. As a matter of fact, it is common experience that men living in society must suffer some inconveniences and transgressions without which no society is possible. That being so, it would be travesty of law to deal with such trivial matters as if they were crimes. It is because of this the law rightly exempted such trivial actions from the category of crimes. A close examination of the provisions of this section shows that even the intentional causing of harm specified in that section is excused because of its triviality. The word 'harm' no doubt means injury of any kind, including injury to mind, body or property. It provides that in the normal circumstance even if the injury to mind, body or property is caused and if the harm is so trivial, no person of ordinary sense and temper would complain of it.

7. The harm complained of in the instant case is so trivial that such incidents do happen almost every day in life particularly in rural parts. Taking into consideration the society in general and particularly the society to which P. W. 1 and P. W. 7 belonged and taking into consideration the circumstances under which there was a quarrel between them in which some minor injury was caused to P. W. 7, it would be accepted that in the normal course either P. W. 1 or P. W. 7 would not have complained of it. It is difficult to visualise how the

machinery of the investigating agency was moved to take up this case and more difficult to comprehend why the investigating agency took up this matter for investigation and then filed a charge sheet against the petitioners. It is said that petitioner No. 2 is a student. Taking all these circumstances into consideration, if the investigating agency had properly applied its mind to the facts of the case I think they would not have filed this case against the petitioners.

8. Even assuming that the prosecution case is wholly true, the crime that the petitioners committed is so trivial it falls within the scope of S. 95, I. P. C. This section is intended to exempt from criminality offences which, from their triviality do not deserve the name of crimes even though in one sense they are crimes because they fall within the definition of crimes, and but for this section the said crimes are punishable. Therefore advisedly the framers of law have thought of this section as an exemption and cases of the types specified therein.

9. For the reasons stated above, I allow this petition and set aside the conviction passed against the petitioners and acquit them.

Petition allowed.

1970 Cri. L. J. 1190 (Vol. 76, C. N. 296)
(MYSORE HIGH COURT)

M. SANTHOSH, J.

Kittanna Rai, Petitioner v. The State of Mysore, Respondent.

Criminal Revn. Petn. No. 188 of 1969
D/- 6-1-1970.

Essential Commodities Act (1955), S. (1) (a) — Southern States (Regulation of Export of Rice) Order (1964), S. 3-A — Neither transporting of rice within same town or village nor mere carrying of rice within belt area is an offence — No evidence of actual transport out of belt area — Amounts only to preparation and no attempt — No offence.

Before the accused can be convicted for contravention of S. 3-A, the prosecution has to prove that the accused transported or attempted to transport rice to any place outside that area. With regard to cl. (b) of S. 3-A, the prosecution has to prove that the accused transported rice from any place in the border area to any other place in that area. Moving within

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the same town or village in the border area, as per sub-cl. (4) of the proviso, would not amount to an offence under S. 3-A of the Order. The prosecution has not let in any evidence to show that the accused had transported the rice from any place in the border area to any other place in that area, but has only proved that he was carrying rice within a village. It would only amount to preparation, which is not an offence. 1962 (1) Cri L J 830 (Mys) and Cri. App. No. 186 of 1966 (SC) = 1969-1 Mys L J (Journal) page 6, Rel. on. (Paras 5 and 6)

Cases Referred: Chronological Paras
(1968) Cri. Appeal No. 186 of 1966 =
1969-1 Mys L J (Journal) page 6
(SC), Malkiat Singh v. State of
Punjab 3, 8

(1962) 1962 (1) Cri C J 830 = 39 Mys
L J 742, Baburao Balwant Kurubet
v. State of Mysore 3, 4, 7

M R Suvarna, for Petitioner; N. A. Mandagi, High Court Govt., Pleader and Ex-Officio Public Prosecutor, for State.

ORDER. — The petitioner before this court was the accused in Summary Trial Case No. 828 of 1967 in the Court of the Judicial First Class Magistrate, Puttur, South Kanara. The petitioner has been convicted of an offence under S. 3-A of the Southern States (Regulation of Export of Rice) Order, 1964, read with S. 7 (1) (a) (ii) of the Essential Commodities Act, and sentenced to pay a fine of Rs. 75, in default to undergo S. I. for three weeks. In this revision, he challenges the legality and correctness of the said conviction and sentence passed on him.

2. The prosecution case is that on 8-10-67 at about 5.30 A.M., when P. W. 3, the Assistant Sub-Inspector of Food Mobile Squad was patrolling the border area, he found the accused in a locality called Kemme-thadka, transporting about 30 Kgs of boiled rice in a gunny bag. He asked the accused whether he had a permit to transport the rice to Kerala State. As the accused did not possess any permit to transport the rice, he seized the same under the Yadast Exhibit P-3 in the presence of P. W. 2 Gopala Krishna Rao, a Panch witness.

3. It has been contended by Sri Suvarna, learned counsel appearing on behalf of the petitioner, that the prosecution has not proved that the accused had committed any offence under S. 3-A of the Southern (Regulation of Export of Rice) Order, which will be hereinafter referred to as the order. It is argued that the pro-

secution has not proved that the accused transported the rice from any place in the border area to any place outside the border area; nor has the prosecution proved that the accused transported rice from any place inside the village or town in the border area, to any place outside the village or town, in the border area. It is stressed that under the 4th proviso to S. 3-A, it would be an offence only if rice is transported from inside a village or town in the border area to any place outside the village or town, or from one village or town to another village or town in the border area. It is contended that the prosecution evidence does not show that the accused transported the rice from one town to another town or from inside the town to any place outside the town. The accused was caught in the village of Kemmethadaka. The prosecution has not let in any evidence to show that the accused was taking the rice from Kemmethadka to any other village or town. Sri Suvarna also contends that even if the prosecution evidence is accepted, at worst, it only shows that there was preparation to commit an offence, but not an attempt to commit an offence. Sri Suvarna has strongly relied on a decision of this Court in Baburao Balwant Kurubet v. State of Mysore, 1961-39 Mys L J 742 = (1962 (1) Cri L J 830) in support of his said contention. He has also relied on a decision of the Supreme Court in Malkiat Singh v. State of Punjab, Cr. A. 186/66 reported in Short Notes of Supreme Court cases in Mysore Law Journal Part dated 23-1-1969 at page 6.

4. It is contended by Sri Mandagi, learned Counsel appearing on behalf of the State, that moving with rice within the border area, is itself an offence. If a person is found in the border area carrying rice, it would amount to an offence under S. 3-A of the Order. Sri Mandagi argues that in a case like that, the question of preparation or attempt to commit an offence does not arise. It is also stressed by Sri Mandagi that the decision of this Court in 1961 Mys L J 742 = (1962 (1) Cri L J 830) was rendered not under the present Order; but, it is argued that section 3-A of the Order makes a departure from the earlier Orders with regard to transport of rice. It is further argued that it is for the accused to make out that his case falls within one of the clauses in the proviso to section 3-A.

5. According to section 3-A, no person shall transport, attempt to transport or

abet the transport of rice (a) to any place in the border area from any place outside that area; or (b) from any place in the border area to any place in that area. Before the accused can be convicted for contravention of the said provision of S. 3-A, the prosecution has to prove that the accused transported or attempted to transport rice to any place outside that area. There is no evidence let in by the prosecution to prove that the accused transported the said rice from any place in the border area to any place outside that area. Sri Mandagi has not been able to show that the prosecution has let in any evidence with regard to this. With regard to clause (b) of section 3-A, the prosecution has to prove that the accused transported rice from any place in the border area to any other place in that area. The prosecution evidence only shows that the accused was found carrying 30 Kgs. of boiled rice in Kemmethadka without any permit. The prosecution has not let in any evidence to show that the accused had transported the rice from any place in the border area to any other place in that area. There is considerable force in the contention of Sri Suvarna that transporting rice within the same town or village in the border area is not an offence under S. 3-A. Sub-clause (4) of the proviso to that section clearly states that "nothing contained herein shall apply to transport of rice within the same town or village in the border area."

6. The finding given by the learned Magistrate in paragraph 7 of the judgment is as follows:—

"It is clear from the evidence of P. W. 2 and P. W. 3 that the accused was found carrying 30 Kgs. of boiled rice on 8.10.1967 at about 5.30 A. M., in the locality called Kemmethadka in Nettanige Moodnur village. It is proved by the prosecution witnesses that the locality Kemmethadka is at a distance of about six furlongs from Kerala State border and as such, it comes within belt area. Therefore, there are sufficient materials on the record to think that the accused was carrying 30 Kgs. of boiled rice in the locality called Kemmethadka which is a belt area."

From the said finding of the learned Magistrate, it is clear that he was under the impression that mere carrying of 30 Kgs. of boiled rice within the belt area constitutes an offence under S. 3-A of the Order. As has been pointed out earlier, it is necessary for the prosecution to

prove that the accused transported or attempted to transport rice from any place in the border area to any other place in that area. Moving within the same town or village in the border area, as per sub-cl. (4) of the proviso, would not amount to an offence under S. 3-A of the Order.

7. There is also considerable force in the contention of Sri Suvarna that even if the prosecution evidence is accepted, it would best show that there was only preparation to commit an offence and not an attempt to commit an offence. In 1961 Mys L J 742—(1962 (1) Cr L J 830) Hombe Gowda J., (as he then was), has laid down that in a case where the petitioner was found transporting bags of rice in his truck and the said truck was stopped near the Toll Naka, about a mile away from the border of the State of Bombay, and the petitioner was prosecuted, as in the instant case under S. 7 of the Essential Commodities Act, the petitioner could not be found guilty of an offence under that section inasmuch as he did not actually transport the bags of rice out of Mysore State. Simply because the vehicle was proceeding in the direction of Bombay State, it could not be presumed that the petitioner would have entered the State of Bombay. In the said case, the petitioner was transporting 64 bags of rice in his truck when the same was stopped by the Head Constable near the Toll Naka of Sankeshwar. The Head Constable had information to the effect that the petitioner was transporting rice to the State of Bombay. Because, of this information, he was lying in wait near the Toll Naka and immediately when the truck came near the Toll Naka, he stopped the vehicle and found 64 bags of rice and seized the same. His Lordship held that on the facts proved in the case, it would amount only to preparation and not an attempt to commit an offence under S. 7 of the Essential Commodities Act. The conviction of the petitioner was therefore set aside.

8. In Cr. A. 188 of 66 reported in Short Notes, Page 6 of the Mysore Law Journal Part dated 23.1.1969, their Lordships of the Supreme Court held that where a truck loaded with paddy which was driven by the accused was seized well inside the boundary of the State, it does not amount to an attempt to export of paddy within the Punjab Paddy Export Control Order. It was merely a preparation on the part of the accused.

9. I am therefore of opinion that, from the evidence on record, it cannot be said that the accused had attempted to commit the offence and that the prosecution evidence, even if accepted, would only show that there was preparation to commit the offence.

10. After going through the evidence in the case, I am of opinion that the prosecution has not proved by satisfactory evidence the charge against the accused, and therefore, the conviction and sentence passed on him have to be set aside.

11. In the result, I allow this revision petition and set aside the conviction and sentence passed on the petitioner by the learned Judicial First Class Magistrate, Puttur. The fine amount, if already paid, shall be refunded to him. The order of confiscation of the rice to the State will stand, as the petitioner's case is that he was not carrying the said rice with him on the morning in question.

Petition allowed.

1970 CRI. L. J. 1193 (Vol. 76, C. N. 297)

(ORISSA HIGH COURT)

A. MISRA J.

Sukra Tilming Munda and others, Petitioners v. State of Orissa, Opposite Party.

Criminal Revn. No. 190 of 1967, D/- 28.10.1969, from order of S. D. M., Sundergarh, D/- 20.12.1966.

Forest Act (1927), Ss. 20 (2), 26 (h), 20-A (as inserted by Orissa Act 11 of 1954) — Recognition of certain area as forest land under S. 20-A—Accused committing offence punishable under S. 26 (h), within such area — His conviction is not illegal for want of notification under S. 20 (2).

To constitute a reserved forest under the Forest Act, the requirements of the procedure laid down in the Act must have been complied with followed by a notification under S. 20 (2). However, if certain area is recognised as reserved forest under S. 20-A (as inserted by Forest (Orissa) Amendment Act of 1954), the question of a notification under S. 20 (2) is irrelevant (Para 6)

Where the evidence discloses that certain area is a reserved forest under S. 20-A and that the accused have committed an offence under S. 20 (h) within such area, his conviction cannot be set

aside for want of notification under S. 20 (2) : (1966) 32 Cut L T 299, Ref. to. (Para 6)

Case Referred : Chronological Paras
(1966) 1966.32 Cut L T 299, Sana-
tan Mahallik v. State 6

B. K. Basu, for Petitioners ; S. Misra, for Opposite Party.

ORDER.— Each of the petitioners has been convicted under S. 26 (h) of the Indian Forest Act and sentenced to a fine of Rs. 50/-, and in default, to undergo rigorous imprisonment for one month.

2. According to the prosecution, on 25th September 1964, petitioners were detected in clearing bushes, breaking land and felling some trees in the Dhaniapunji compartment of Kududa reserved forest. They were prosecuted for an offence under S. 26 (h) of the Indian Forest Act. Petitioners denied to have committed any offence, while petitioner No. 1 claimed that as Mundari Khuntkathidar of village Dhaniapunji, he had the right to clear the jungle and perform puja at the place of occurrence. They also contended that the area in question is not a reserved forest.

3. Prosecution examined, in all, four witnesses including the forest guards (P. Ws. 2 to 4) who detected the offence, P. W. 1 is the Forester who made an enquiry on receipt of the report from P. Ws. 2 to 4, visited the spot of occurrence and noticed the clearing of the area in the reserved forest and cutting of trees. The learned Magistrate accepted the testimony of the P. Ws. convicted and sentenced the petitioners, as stated above.

4. Learned Counsel for petitioners does not question the merits of the evidence on the basis of which the petitioners are found to have engaged themselves in clearing bushes, breaking land and cutting trees at the place of occurrence, but assails the conviction and sentence on the following two grounds : (1) Petitioner No. 1 as Mundari Khuntkathidar of village Dhaniapunji possessed the right to clear the jungle and establish settlement and (2) prosecution has failed to prove that the place where the clearing of bushes and breaking of land was committed is within the reserved forest.

5. Point No. 1.— Admittedly, the place of occurrence appertains to the ex-State area of Gangpur. Learned counsel for petitioners urges that under the provisions of the Chhotanagpur Tenancy Act, petitioner No. 1 has a right to clear bushes and break land even inside a reser-

ved forest for establishing a settlement for residence of people. Even assuming that under the said Act petitioner No. 1 has any rights as claimed by him, it has not been shown that any such provision was extended to or was in force in the ex-State of Gangpur. Therefore, this contention has no merit.

6. Point No. 2: — Next it is argued that in the absence of a notification under S. 20 (2) of Indian Forest Act, the area cannot be treated as a reserved forest, and as such, the acts of petitioners will not constitute an offence under S. 26 (h). In support of this contention, he relies on a decision reported in (1966) 32 Cut L T 299, Sanatan Mahalik v. State. There is no dispute that to constitute a reserved forest under the Indian Forest Act, the requirements of the procedure laid down in the Act must have been complied with followed by a notification under S. 20 (2). Learned counsel for the State, however, contends that the area in question is a reserved forest under S. 20-A of the Indian Forest (Orissa) Amendment Act of 1954, and as such, the question of a notification under S. 20 (2) is irrelevant. Subsection (1) of S. 20-A of the aforementioned amending Act runs as follows :

“20-A. Notwithstanding anything contained in this Act or in any other law for the time being in force any forest land or waste land in the merged territories which had been recognised by the Ruler of any merged State immediately before the date of merger as a reserved forest in pursuance of any law, custom, rule, regulation, order or notification for the time being in force or which has been dealt with as such in any administration report or in accordance with any working plan, or register maintained and acted upon immediately before the said date and has been continued to be so dealt with thereafter, shall be deemed to be reserved forests for the purpose of this Act.”

Apart from the evidence of P. W. 1 that the Kukuda forest within which the clearing of bushes and breaking of land took place is a reserved forest, the prosecution also produced the working plan of the ex-State of Gangpur wherein the Kukuda forest has been classified as a reserved forest prior to the date of merger. The Orissa Gazette dated 8-2-63 also shows that the State Government recognised, maintained and acted upon the working plan of the ex-State of Gangpur under a notification dated 24-1-63. As the working plan was not on record, learned counsel

for petitioners questioned the correctness of the statements made to that effect in the trial Court judgment. The prosecution produced the working plan of the ex-State of Gangpur, on verification of which, it is found that this Kukuda forest has been classified as a reserved forest. Thus, under S. 20-A of the Orissa Amendment to the Indian Forest Act, the Kukuda forest is a reserved forest, and as such, the acts of petitioners clearly amounted to an offence under S. 26 (h) of the Indian Forest Act. Hence, they have been rightly convicted and sentenced.

7. In the result, the revision fails and is accordingly dismissed.

Petition dismissed.

1970 ORI. L. J. 1194 (Vol. 76, C. N. 298)
(ORISSA HIGH COURT)

A. MISRA, J.

Japan Mohanta and others, Petitioners
v. Dubulia Munda, Opposite-party.

Criminal Revn. No. 308 of 1967, D/- 30-10-1969 from order of S. D. M., Champua, D/- 26-5-1967.

(A) Criminal P. C. (1898), S. 145—Proceedings under—Question to which party subject-matter of dispute pertains is not a matter for determination — Jurisdiction of Magistrate is confined to determination of question of actual physical possession of subject-matter of dispute on date of preliminary order irrespective of rights of any of the parties to claim possession thereof (Para 4)

(B) Criminal P. C. (1898), S. 145 (4) — Proceedings under—Perusal of affidavits — Magistrate can accept or reject affidavits filed by either party.

It is entirely within the jurisdiction of the Magistrate to accept or reject the affidavits filed by either party; provided in doing so, he applies his mind to the statements of the deponents and gives reasons why he prefers one set of affidavits to the other. (Para 5)

Where the Magistrate has considered the affidavits filed on behalf of both parties, but preferred those supporting the 1st party's possession primarily on the ground that deponents are adjacent owners, and as such, competent to speak about actual possession;

Held the Magistrate had not failed to apply his mind or give reasons for his

BN/CN/A675/70/LGC/B

preferring the affidavits filed on behalf of the 1st party to those filed on behalf of the 2nd party. (Para 5)

(C) Criminal P. C. (1898), S. 145 — Proceedings under police report—Magistrate is entitled to peruse police report for limited purpose of satisfying himself as to likelihood of breach of peace and as to identity of subject-matter of dispute — It is inadmissible as evidence in inquiry relating to possession of parties — Magistrate commits illegality in utilising facts stated in police report in inquiry regarding possession and relying on it while determining the same. (Para 6)

(D) Criminal P. C. (1898), S. 145 (6) — Final order — Magistrate not considering evidence or coming to a finding as to which of the parties was in actual possession of disputed land on date of preliminary order or if there was forcible and wrongful dispossession within two months preceding the date of preliminary order — In absence of such finding the order declaring possession of a party is not legal. (Para 7)

S. Mohanti, for Petitioners.

ORDER :— The 2nd party members in a proceeding under S. 145, Criminal P. C. are the petitioners herein. According to the 1st party, the land in dispute measuring 1.85 acres appertaining to plot No. 259 has been in his possession since 40 years or so. On 25-10-66, the 1st party reported at the P. S. that the 2nd party members forcibly reaped the crop grown by him. After enquiry, police submitted a report, on the basis of which, the preliminary order was passed under S. 145, Criminal P. C., on 23-11-66. The 2nd party members, on the other hand, allege that 1.20 acres out of the disputed land appertains to their plot No. 258 and 0.4 acre appertains to plot No. 252. The disputed land consists of 11 kitas which have been divided among them and each is in possession of a portion. They assert that the 1st party was never in possession of the subject-matter of dispute.

2. In support of their respective claims of possession of the disputed land, each of the parties filed four affidavits. During the course of enquiry, an amin was deputed who after local investigation reported that the subject-matter of dispute partly appertains to plot No. 252/1 and partly to plot No. 258/1. The learned Magistrate, however, confined his consideration to the determination of actual physical possession of the disputed land and relying on the affidavits filed on behalf of 1st party

and the report of the police, declared the 1st party to be in possession and prohibited the 2nd party from entering upon the land until eviction in due process of law.

3. The order of the learned Magistrate is assailed by learned counsel for the petitioners mainly on the following three grounds : (1) There has been no proper appreciation of the evidence furnished by the affidavits ; (2) the learned Magistrate has erred in taking into consideration facts stated in the police report in determining the question of possession and (3) the order of the learned Magistrate is illegal, as there is no finding as to which of the parties was in possession of the disputed land on the date of the preliminary order.

4. Learned counsel for petitioners points out that the 1st party does not claim to be in possession of any land appertaining to plot No. 258 or 252. So also, the 2nd party members do not claim possession of any land appertaining to plot No. 259. During the course of enquiry, the learned Magistrate deputed an amin who after local investigation, found and reported that the subject-matter of dispute appertains to plot Nos. 252 and 258. It is argued that in the face of this report, the learned Magistrate has committed an error in finding possession of the disputed property with the 1st party who himself does not claim any land appertaining to plot Nos. 252 and 258. As has been rightly observed by the learned Magistrate, the question whether the subject-matter of dispute appertains to 1st party's plot No. 259 or 2nd party's plot Nos. 252 and 258 is not a matter for determination in a proceeding under S. 145, Criminal P. C. The jurisdiction of the Magistrate in such a proceeding is confined to determination of the question of actual physical possession of the subject-matter of dispute on the date of the preliminary order irrespective of the rights of any of the parties to claim possession thereof. Therefore, the learned Magistrate has correctly approached the question in observing that the only fact to be decided in the proceeding is the fact of actual physical possession of the disputed land.

5. The first contention of learned counsel for petitioners is that the learned Magistrate has not properly appreciated the evidence furnished by the affidavits of respective parties. Each of the parties filed four affidavits in support of its claim of possession. The affidavits filed on

Naran assaulted her with a Pitana, but she caught hold of the Pitana and then appellant No. 1 Bhaskar struck her with a Bamboo thenga (M. O. I) and she fell down and died. His evidence tends to show that the blow which appellant No. 2 Naran aimed at the deceased did not strike her as she caught hold of the Pitana and the blow which actually struck her was given by appellant No. 1 with the bamboo thenga (M. O. I). P. W. 2 however stated that Naran assaulted the deceased with a Pidha (M. O. III) about which P. W. 1 had not spoken a word.

According to P. W. 3, Bhaskar assaulted her mother with the Pidha (M. O. III) and Naran with the Pitana (M. O. II). Apart from the fact that her evidence regarding the assault on the deceased is discrepant from what P. Ws. 1 and 2 have deposed on this point, it was suggested to her that she had stated before the police that she came to the spot after the assault was over. Although she denied the suggestion made to her, it was elicited from the I. O. (P. W. 15) that P. W. 3 had stated before him that she was in the kitchen and that on hearing the hulla she came to the place of occurrence after the death of her mother. It therefore appears to me that P. W. 3 has not seen the occurrence. The other eye-witness P. W. 5 says that on the night of occurrence on hearing the hulla he went to the spot and found that Bhaskar was armed with a Pitana (M. O. II) and Naran was armed with a Pidha (M. O. III), and they were assaulting Markand (P. W. 2).

Just then the deceased came to the spot whereupon the deceased was struck with the Pitana (M. O. II) by Bhaskar and she fell down dead. It is therefore clear from his evidence that appellant No. 2 Naran had not actually dealt any blow to the deceased. This is in conformity with the evidence of P. W. 2 and with what is stated in the F. I. R. lodged by P. W. 1 at the Police Station. P. Ws. 9 and 10 deposed that they were present at the place of occurrence and their evidence is that while the appellants on one side and the P. W. 1 on the other were pushing one another, Udia Bewa came to the spot and she fell down on stones and died.

According to P. W. 9 appellants Nos. 1 and 2 had nothing in their hands. It is surprising that neither P. W. 9 nor P. W. 10 was declared hostile by the prosecution and cross-examined. P. W. 15, the I. O. has stated categorically that the place of occurrence was an open threshing floor and he did not find any stones or wooden

pegs fixed in the ground. The occurrence took place at 8 p. m. and the I. O. visited the spot at 6 a. m. next day, that is, after 10 hours. If there were any stones or pegs at the place of occurrence, the I. O. would not have failed to notice them or signs of their recent removal from the place of occurrence. Although the public prosecutor has grossly failed in his duty to declare P. Ws. 9 and 10 hostile and cross-examine them, yet having regard to the evidence on record and the other circumstances, I entirely agree with the view of the learned Sessions Judge that P. Ws. 9 and 10 have not spoken the truth.

5. The doctor (P. W. 12) has stated that the injuries which he found on the person of the deceased could be caused by hard and blunt weapons like M. Os. II and III. Here again the prosecution has failed to show M. O. I to the doctor and obtain his opinion whether the injuries on the deceased could be caused by M. O. I. But it is clear that if the injuries could be caused by M. Os. II and III, they could as well be caused by M. O. I which is also a hard and blunt weapon. It was elicited from the doctor that the injuries could also be caused by a fall against a hard substance and it is therefore argued on behalf of the appellants that the injuries found on the person of the deceased might have been caused when she admittedly fell down on the ground.

It is clear from the post mortem report as also from the evidence of the doctor that the cause of death in this case is rupture of the liver and he stated that this rupture can be caused either by a blow or by a fall with force against a hard substance. There is no evidence that the deceased fell down on the ground with any force to cause rupture of the liver. If she had fallen with some amount of force on the ground one would expect other injuries on her body, which admittedly are not present. These circumstances establish beyond doubt that the rupture of the liver of the deceased was caused as a result of the blow with a hard and blunt substance and not by merely falling down on the ground.

6. I have already indicated that the evidence on record is not sufficient to establish that Naran, appellant No. 2 had dealt any blow on the deceased. The evidence of P. Ws. 1, 2 and 5 prove beyond any reasonable doubt that it is appellant No. 1 Bhaskar who dealt the blow. According to P. Ws. 1 and 2, the appellant No. 1 dealt the blow with a bamboo thenga (M. O. I) while according to P. W. 5

appellant No. 2 dealt the blow with the Pitana (M. O. II). The slight discrepancy in the weapon used does not in my opinion affect the fact that it is appellant No. 1 who dealt the fatal blow to the deceased.

7. The last point for consideration is what offence the appellant No. 1 has committed. It is argued on behalf of the appellants that the act of the appellant No. 1 may at best constitute an offence under S. 324, Penal Code. I fail to see how this can be so. The deceased was 50 years old and when appellant No. 1 had dealt a blow with M. O. I on a vital part of her body he must be presumed to have had the knowledge that a blow given with the thenga M. O. I on that part of body is likely to cause death, although he might not have intended either to cause her death or to cause any injury which is likely to cause her death. In fact death has been caused in this case. In the circumstances I consider that the appellant No. 1 has been rightly convicted under Part II of Section 304, Penal Code. Having regard however to the circumstances of the case I feel that the sentence of R. I. for 5 years imposed on him by the learned Sessions Judge is rather severe and that the ends of justice would be sufficiently met if it is reduced to 3 years. So far as appellant No. 2 Naran is concerned, having regard to the circumstances already stated it must be held that the prosecution has failed to establish that he was in any way responsible for the death of the deceased.

8. In the result, this appeal is allowed in part. The conviction of appellant No. 2 Naran Mallik under S. 304, Part 2, Penal Code and the sentence of 5 years' R. I. imposed on him are set aside and I direct that he be set at liberty forthwith. The conviction of appellant No. 1 Bhaskar Mallik under S. 304, Part 2, Penal Code, is upheld, but the sentence on him is reduced to 3 years' R. I.

Appeal partly allowed.

1970 CRI. L. J. 1199 (Vol. 76, C. N. 300)

(PATNA HIGH COURT)

S. WASIUDDIN, J.

Dinesh Thakur, Petitioner v. State of Bihar, Respondent.

Criminal Revn. No. 2266 of 1968, D/- 9.4.1969 against order of IV Asst. S. J., Gaya, D/- 5.8.1968.

KM/BN/F 535/69/TVN/B

(a) Criminal P. C. (1898), S. 367 — House trespass—Prosecution for — Person seen on roof top of house, jumping in the khand — Person who was the accused, was caught in the khand—Plea that there was no proof of the accused having been seen on the roof top rejected. (Penal Code (1860), S. 451). (Para 4)

(b) Penal Code (1860), Ss. 441 and 442 — Criminal trespass and house trespass — Distinction between.

The definition of criminal trespass in S. 441 and that of house trespass in S. 442 show that as far as the former is concerned, it is committed when anybody enters into or upon the property of any one with intent to commit an offence or to intimidate, but S. 442 lays down that 'house trespass' can be only if any one enters into a building. (Para 6)

(c) Penal Code (1860), Ss. 441 and 442 — "Building", what is — Roof of a house is part of the building—Other ingredients being present, going on the roof will be criminal as well as house trespass. 195. All L J 461, Diss.

The question as to what is a building must always be a question of degree and circumstances and it is impossible to lay down any general definition of the same. However, going on the roof of a house is not only a criminal trespass, but also a house trespass because the roof of a house is naturally a part of the building and it cannot be treated as something independent or separate from the building. The words "entered into" should not be taken too literally. The other ingredients of the offence being satisfied, going on the roof of a house would amount to the offence. 49 All L J 461, Diss.; (1907) 6 Cri L J 444 (Lah), (1919) 20 Cri L J 571 (LB) & AIR 1961 Pat 409, Ref. (Para 9)

(d) Penal Code (1860), Ss. 441 and 442 — Intention necessary to constitute offence, how inferred.

The fact that there was or not any intention to commit an offence is a matter on which usually it is impossible to adduce positive and tangible evidence and it is a matter which has to be judged in the light of the evidence and surrounding and antecedent circumstances. In a case where the accused had gone on the roof of a house at 10 in the night and on being sighted, jumped from house to house and was caught in a khand :

Held, that his presence there was with an intention to commit some offence.

(Para 10)

Cases Referred : Chronological Paras
 (1961) AIR 1961 Pat 409 (V 48)=
 1961 (2) Cri L J 540, Ramjee
 Kahar v. State 9
 (1951) 1951 All L J 461, Hiralal v.
 State 6, 7, 8
 (1933) AIR 1933 Lah 433 (1) (V 20)
 =34 Cri L J 1131, Nanhun v.
 Emperor 8
 (1919) 20 Cri L J 571=52 Ind Cas
 59 (LB), Batwa Khan v. Emperor 7
 (1907) 6 Cri L J 444=1907 Pun Re
 15 (Lah), Walidad v. Emperor 6

Awadh Kishore Prasad, for Petitioner,
 Chatrapati Kumar Sinha, for Respondent.

ORDER. — There is only one petitioner in this case and he was convicted by the learned Magistrate for the offence under S. 457, Penal Code and was sentenced to undergo rigorous imprisonment for six months. He preferred an appeal which was heard by the learned Assistant Sessions Judge and the latter altered the conviction into one under S. 451, Penal Code and also reduced the sentence by three months. According to the conviction which now stands the petitioner has been convicted under S. 451, Penal Code and sentenced to undergo rigorous imprisonment for three months.

2. According to the prosecution, on 14.8.1965, at about 10 p. m., the petitioner was seen on the roof of the house of the informant who is P. W. 3 in this case, and on an alarm being raised by P. W. 3, the petitioner jumped from there to the roof of the neighbouring house and ultimately when he came down he was caught in the Khand. After having been caught and arrested there, he was taken to the police station where a first information report was lodged and a case was instituted against him.

2. The defence of the petitioner was that he was not guilty and that on account of old enmity with the informant he had been falsely implicated and further according to the petitioner what happened was that he was coming from his hair dressing saloon after having closed it in the night and while going to his house, he was caught by the informant and his men and further that he had some money with him which was also taken from him and then he was falsely implicated.

3. The learned Magistrate held that the prosecution had been able to prove the case against the petitioner and also disbelieved the defence version and the learned Assistant Sessions Judge on appeal also held that the prosecution had been

able to prove the case. The petitioner being aggrieved thereafter has preferred this revision and in this two main points have been submitted. One of these is that the evidence on record does not disclose that the petitioner had been identified as the person who was on the roof of the house. The second point which has been urged is that the ingredient of the offence under S. 451, Penal Code had not been proved and so the petitioner could not have been convicted under that section.

4. I may take up the first point which has been urged in this connection and as stated above, according to the prosecution, the petitioner was seen on the roof of the house. It is true, as it appears from the evidence and very rightly indeed the petitioner at that time could not have been identified when he was on the roof of the house, but the evidence on record shows that the witnesses felt and saw that there was some one on the roof of the house. There was the consistent evidence of the witnesses examined on behalf of the prosecution that on the night of the occurrence they heard hulla of 'chore,' chore' and on hearing the same when they came out, they saw a man jumping from one roof of the house to another and immediately jumping into a Khand where that particular man was caught hold of and he was found to be none else, but the petitioner himself.

There was the evidence of P. W. 3, that is, the informant himself that he woke up on hearing some sound on his roof and also breaking of tiles with which the roof of the house, was partly made and that after coming out into the courtyard, he found a man on his roof at which he raised an alarm of 'chore,' 'chore' whereupon that man jumped from the roof of his house to the adjoining roof of the house of Kameshwar Pandey and then he was jumping from one roof to the other. It appears to me from the evidence which has been believed by both the Courts below that the person who was on the roof was seen jumping from one roof to the other and ultimately he was caught hold of in the Khand. It is not a case where there were more than one person and in the light of the evidence and the circumstances, there can be no doubt about the identity of this petitioner when he was seen jumping from one roof or the other and ultimately he was caught in the Khand. There is thus no substance in this point.

5. The next point which has been urged is rather interesting because the

submission which has been made in this contention is that even assuming that the petitioner was on the roof of the house, it will not be a house trespass as contemplated by the Indian Penal Code and the second point which has been urged in this connection is that there was no evidence to show that the other ingredient of the section was also present, viz. that he had the intention to commit an offence.

The Indian Penal Code contemplates two kinds of offence of trespass, one of which is a 'criminal trespass' and the other is a 'house trespass'. Criminal trespass has been defined in S. 441 of the Penal Code which lays down that

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit 'criminal trespass'."

'House trespass' has been defined in S. 442 of the Penal Code and it is as follows :

"Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit 'house-trespass'."

Explanation—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass."

6. The two definitions will show that as far as the 'criminal trespass' is concerned, it is committed when any body enters into or upon the property of any one with intent, of course, to commit an offence or to intimidate...but S. 442 lays down that 'house trespass' can be only if any one enters into a building. The conviction, as stated above, of the petitioner has been under S. 451, Penal Code. This section lays down :

"Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be

committed is theft, the term of the imprisonment may be extended to seven years." It has been urged that the conviction under S. 451, I. P. C. was bad because no 'house-trespass' had been committed by the petitioner, inasmuch as, going upon the roof of the house will not tantamount to an entry into a building as contemplated by S. 442 of the Penal Code. It may be mentioned here that this cannot be doubted that even if the conviction under S. 451, I. P. C. cannot be sustainable on account of the fact that going on the roof of the house will not be entering into a building still the petitioner can be convicted for criminal trespass only provided of course that the intention to commit an offence be present.

The learned counsel for the petitioner in support of his contention that going on the roof of the house will be not entering into the building has relied on a decision of the Allahabad High Court in the case of Hiralal v. State, reported in (1951) 49 All L J 461. In that case it was held by a Single Judge of the Allahabad High Court that going on to the roof of a house does not amount to an entry into a building and that in a case covered by S. 442 of the Penal Code the entry must be into the building or remaining in the building and the person who is on the roof of a building cannot be said to be in the building. The Hon'ble Judge for this view of his has relied on three decisions, one of which is in the case of Walidad alias Walya v. Emperor, reported in (1907) 6 Cri L J 444. This was a case of the Punjab (Lahore) High Court and the accused in that case was found on the roof of the house of the complainant and after striking at the complainant with a stick had a struggle with him and then the accused jumped into the yard of a neighbouring house and in the course of the struggle the accused also dropped the stick and a sandheva (a house-breaking implement). The accused in that case had been convicted under Ss. 457/511, I. P. C., that is, for the offence of an attempt to commit house breaking. It was, in the circumstances of that case, that the mere presence on the roof of the house could not be construed as an attempt to commit an offence under S. 511, I. P. C., but he was held guilty of criminal trespass punishable under S. 447 of the Penal Code. On a perusal of the judgment of that case, I find that there was no discussion of this aspect of the matter whether going on the roof of a house would be a 'house trespass' or not and the only point...

Cases Referred: Chronological Paras
 (1961) AIR 1961 Pat 409 (V 48)=
 1961 (2) Cri L J 540, Ramjee
 Kahar v. State 9
 (1951) 1951 All L J 461, Hiralal v.
 State 6, 7, 8
 (1933) AIR 1933 Lah 483 (1) (V 20)
 =34 Cri L J 1131, Nanhun v.
 Emperor 8
 (1919) 20 Cri L J 571=52 Ind Cas
 59 (LB), Batwa Khan v. Emperor 7
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2. According to the prosecution, on 14-8-1965, at about 10 p. m., the petitioner was seen on the roof of the house of the informant who is P. W. 3 in this case, and on an alarm being raised by P. W. 3, the petitioner jumped from there to the roof of the neighbouring house and ultimately when he came down he was caught in the Khand. After having been caught and arrested there, he was taken to the police station where a first information report was lodged and a case was instituted against him.

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3 The learned Magistrate held that the prosecution had been able to prove the case against the petitioner and also disbelieved the defence version and the learned Assistant Sessions Judge on appeal also held that the prosecution had been

able to prove the case. The petitioner being aggrieved thereafter has preferred this revision and in this two main points have been submitted. One of these is that the evidence on record does not disclose that the petitioner had been identified as the person who was on the roof of the house. The second point which has been urged is that the ingredient of the offence under S. 451, Penal Code had not been proved and so the petitioner could not have been convicted under that section.

4. I may take up the first point which has been urged in this connection and as stated above, according to the prosecution, the petitioner was seen on the roof of the house. It is true, as it appears from the evidence and very rightly indeed the petitioner at that time could not have been identified when he was on the roof of the house, but the evidence on record shows that the witnesses felt and saw that there was some one on the roof of the house. There was the consistent evidence of the witnesses examined on behalf of the prosecution that on the night of the occurrence they heard hulla of 'chore,' 'chore' and on hearing the same when they came out, they saw a man jumping from one roof of the house to another and immediately jumping into a Khand where that particular man was caught hold of and he was found to be none else, but the petitioner himself.

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5. The next point which has been urged is rather interesting because the

submission which has been made in this contention is that even assuming that the petitioner was on the roof of the house, it will not be a house trespass as contemplated by the Indian Penal Code and the second point which has been urged in this connection is that there was no evidence to show that the other ingredient of the section was also present, viz. that he had the intention to commit an offence.

The Indian Penal Code contemplates two kinds of offence of trespass, one of which is a 'criminal trespass' and the other is a 'house trespass'. Criminal trespass has been defined in S. 441 of the Penal Code which lays down that

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit 'criminal trespass'."

'House trespass' has been defined in S. 442 of the Penal Code and it is as follows :

"Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit 'house-trespass'.

Explanation—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass."

6. The two definitions will show that as far as the 'criminal trespass' is concerned, it is committed when any body enters into or upon the property of any one with intent, of course, to commit an offence or to intimidate...but S. 442 lays down that 'house trespass' can be only if any one enters into a building. The conviction, as stated above, of the petitioner has been under S. 451, Penal Code. This section lay down :

"Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be

committed is theft, the term of the imprisonment may be extended to seven years." It has been urged that the conviction under S. 451, I. P. C. was bad because no 'house-trespass' had been committed by the petitioner, inasmuch as, going upon the roof of the house will not tantamount to an entry into a building as contemplated by S. 442 of the Penal Code. It may be mentioned here that this cannot be doubted that even if the conviction under S. 451, I. P. C. cannot be sustainable on account of the fact that going on the roof of the house will not be entering into a building still the petitioner can be convicted for criminal trespass only provided of course that the intention to commit an offence be present.

The learned counsel for the petitioner in support of his contention that going on the roof of the house will be not entering into the building has relied on a decision of the Allahabad High Court in the case of Hiralal v. State, reported in (1951) 49 All L J 461. In that case it was held by a Single Judge of the Allahabad High Court that going on to the roof of a house does not amount to an entry into a building and that in a case covered by S. 442 of the Penal Code the entry must be into the building or remaining in the building and the person who is on the roof of a building cannot be said to be in the building. The Hon'ble Judge for this view of his has relied on three decisions, one of which is in the case of Walidad alias Walya v. Emperor, reported in (1907) 6 Cri L J 444. This was a case of the Punjab (Lahore) High Court and the accused in that case was found on the roof of the house of the complainant and after striking at the complainant with a stick had a struggle with him and then the accused jumped into the yard of a neighbouring house and in the course of the struggle the accused also dropped the stick and a sandheva (a house-breaking implement). The accused in that case had been convicted under Ss. 457/511, I. P. C., that is, for the offence of an attempt to commit house breaking. It was, in the circumstances of that case, that the mere presence on the roof of the house could not be construed as an attempt to commit an offence under S. 511, I. P. C., but he was held guilty of criminal trespass punishable under S. 447 of the Penal Code. On a perusal of the judgment of that case, I find that there was no discussion of this aspect of the matter whether going on the roof of a house would be a 'house trespass' or not and the only point which had

been urged before their Lordships was that the mere presence on the roof of the house would not be sufficient to prove that there was an attempt of committing house breaking. In my opinion, therefore, this ruling cannot be an authority on the point that going on the roof of the house is not house trespass.

7. The other decision on which reliance was placed in (1951) 49 All L J 461 is a case of *Batwa Khan v. Emperor*, reported in (1919) 52 Ind Cas 59 = (20 Cri L J 571). This was a case of Lower Burma Chief Court. In that case the accused was detected on the roof of a bazaar with an open clasp knife in his hands and two gunny bags and it was found that he had come there with the intention of committing theft. There also the conviction was under S. 457 read with S. 511, I. P. C., that is, for the attempt of house breaking by night and there also the main point which had been urged was that the conviction under Ss. 457/511 was bad because that even if it be true that the accused was found on the roof of the house with a clasp knife, the matter had not proceeded beyond the stage of preparation, that is, it had not arrived at the stage of an attempt for which some overt act was required. There also the conviction was altered to S. 447, I. P. C., that is, only for criminal trespass. Here in this case also there was no discussion or finding on the point whether going on the roof of the house would be house trespass or not. It may be argued that inferentially it will follow clearly that only the offence of criminal trespass and not the offence of house trespass was committed, but as pointed above, there was no definite finding on this point.

8. Now, reverting again to the decision reported in (1951) 49 All L J 461 their Lordships relied on another decision in the case of *Nanhun v. Emperor*, reported in 34 Cri L J 1181 = (AIR 1933 Lah 433 (1)). This was also a case of the Lahore High Court and here in this case, of course, it was held by the Single Judge of the Lahore High Court that going on to the roof of a house is not entering into a building. In that case that person reached the roof of a house, but jumped down from the back of the roof and it was held that he cannot be said to have entered into the building though he is certainly guilty of an attempt of committing an offence of house breaking. His Lordship referred to the facts as they had been found at p. 1182 (of Cri L J) = (at p. 433

(1) of AIR) and from these facts it appears that the courtyard consisted of a walled enclosure with four kothas opening into it and an outer door leading into a side street. The accused in that case reached the roof of the house and then had started to go down through the ladder towards the courtyard. He had not gone far when he had retraced his foot-steps and jumped down from the back of the roof and his Lordship was pleased to hold that in his judgment, he cannot be said to have entered into the building though he certainly was guilty of an attempt to commit a house breaking. This also, in my opinion, is not an authority which fully supports the view that going to the roof of a house would not be a house trespass.

9. The learned counsel appearing for the State has referred to the decision in the case of *Ramjee Kahar v. State*, reported in AIR 1961 Pat 409, where it was held by a Hon'ble Judge of this Court that Gheran (open space) enclosed by walls and having exits leading to Zenani Kita was a part of building. This ruling is also not directly on the point whether the going on the roof of the house will be house trespass or not. I have referred to the wordings of S. 442, Indian Penal Code, where the word used is 'building' and naturally a very important question arises as to what a building is. The word 'building' has not been defined in the Indian Penal Code. The word 'building' as defined in the Chambers' Dictionary means the art of erecting houses, that is, when it is used as a verb and means anything built, a house, when used as a noun. The question as to what is a building must always be a question of degree and circumstances and it is impossible to lay down any general definition of the same. The learned counsel appearing for both the parties were not able to find any ruling of our High Court on the point whether going on the roof of the house would be a house trespass or not. In my opinion, going on the roof of a house is not only a criminal trespass, but also a house trespass because the roof of a house is naturally a part of the building and the roof cannot be treated as something independent or separate from the building. In this case it appears that there was some portion of tiles also on the roof and if anybody goes on the roof of the house, then it means that he has entered into the building and the words "entered into" should not be taken too literally. I also think that it will be rather a dangerous proposition to lay down that

going on the roof of the house will not tantamount to a house trespass because the roof of a house may also on some portion of it have a structure like a room and it will be stretching the words too much if it is held that even in that case going on the roof of the house will not be a house trespass. I therefore, with respect do not agree with the decisions of the Hon'ble Single Judge of the Allahabad High Court on which reliance has been placed on behalf of the petitioner. To my mind, the roof is also a part of the building and if any one goes on the roof of the house that will be a house trespass, and not only criminal trespass.

10. The other important ingredient of the section is whether it was with the intention to commit an offence and it has been urged that there was nothing to prove that there was any intention to commit any offence particularly when no weapon was found with the petitioner. In my opinion, the fact that there was or not any intention to commit an offence is a matter on which usually it is impossible to adduce positive and tangible evidence and it is a matter which has to be judged in the light of the evidence and surrounding and antecedent circumstances. In this case, the petitioner, at about 10 p. m., was found on the roof of a house, his movement resulting in the breaking of the tiles necessitated the causing of the alarm and then his subsequent conduct in jumping from one roof to the other and then ultimately descending down in a Khand where he was caught are overt acts which clearly, in the circumstances, show that his presence was there with the intention of committing some offence, such as theft. I, therefore, hold that the learned Assistant Sessions Judge was quite right in convicting the appellant under S. 451, Indian Penal Code. Therefore, this conviction is maintained and upheld. The sentence which has been passed also does not appear to be in any way severe and does not call for any interference.

11. The revision petition is, therefore, dismissed.

Petition dismissed.

1970 CRI. L. J. 1203 (Vol. 76, C. N. 301)
(PATNA HIGH COURT)

M. P. VERMA, J.

Janardan Prasad Mandal, Petitioner v. State of Bihar, Opposite party.

Criminal Revn. No. 2605 of 1968, D/- 10-7-1969, against order of S. J., Santhal Parganas, Dumka, D/- 6-12-1968.

Criminal P. C. (1898), Ss. 480, 481 — Provisions of — Are mandatory — Alleged contempts under S. 228, Penal Code—Accused must be told particulars of offence and must be given opportunity to explain them—Disregard of—Amounts to miscarriage of justice. (Penal Code (1860), S. 228)—AIR 1963 Tripura 50 and AIR 1963 All 59, Rel. on. (Paras 2 & 4)

Cases Referred : Chronological Paras (1963) AIR 1963 All 59 (V 50),

Ramnath v. State 4

(1963) AIR 1963 Tripura 50 (V 50),

State v. Bhabesh Chandra Das 4

Mrs. D. Lall and Madan Mohan Prasad Singh, for Petitioner; Md. Khaleel, for State.

ORDER—The sole petitioner, Janardan Prasad Mandal said to be a District Prosecutor at Deoghar, has been found guilty under S. 228 of the Penal Code, read with S. 480 of the Criminal P. C., and sentenced to pay a fine of Rs. 200/- or, in default, to undergo simple imprisonment for one month. This order of conviction and sentence was passed by Shri A. K. Chatterji, Sub-divisional Officer, Deoghar, on the 23rd July, 1968. His order shows that, while he was sitting in Court in the midst of a judicial proceeding, this petitioner "intentionally used such language and gestures as were insulting to the Court and violated its dignity. He showed frayed tempers and tried to shut up the Court by interrupting and raising his own voice unduly." Thereafter, the learned Sub-divisional Officer began writing the impugned order. He further says that, when he was writing this order, the petitioner "left the Court in a huff saying that he refused to work" in his Court. This also caused a contempt of his Court. The learned Sub-divisional Officer, therefore, took cognizance of offences under S. 228 of the Penal Code, read with S. 480 of the Criminal P. C., and imposed the maximum sentence permissible under S. 480, namely, a fine of Rs. 200/-. There was an appeal to the Sessions Judge of the Santhal Parganas, who, by his order dated the 6th December, 1968, dismissed the appeal.

2. Mrs. D. Lall, appearing on behalf of the petitioner, has contended, and, in my opinion, rightly, that the mandatory provisions of Ss. 480 and 481 of the Criminal P. C. have not been followed in this case; and, in that view of the matter, the order is illegal and must be set aside. The procedure to be followed in such cases is of a summary nature. The Court or the officer himself becomes the prosecutor and the prosecution witness. It is, therefore, necessary that, in such cases, the defence of the accused must always be ascertained. This has not been done in this case. Under S. 481 of the Criminal P. C. in every such case, "the Court shall record the facts "constituting the offence" and "the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult." Of course, it may be said that the nature of interruption has been mentioned by the learned sub-divisional Officer when he says that by the shout of the lawyer his work was interrupted or he felt insulted; but he has not given the details as to what statements had been made by the petitioner so that others also may know whether they are derogatory in nature, or whether those statements had been made because the Court itself had remarked in an undignified manner. It is, therefore, clear that the facts constituting the offence are not ascertainable from the records of this case. The nature and stage of the judicial proceeding has also not been indicated, and one cannot say whether the learned Sub-divisional Officer was at that time doing some administrative work, or hearing arguments, or recording evidence, or any such thing. So, the impugned order suffers from this infirmity also.

3. It is also apparent from the records that the sub-divisional officer and the District Prosecutor, namely, the petitioner, were not on good terms from before. From annexure "I" to the revision application, which is a station diary entry No. 285 dated the 14th June 1968, two facts emerge. The owner of the house in which the petitioner was living was a relation of the learned sub-divisional officer and he used to tether his cattle on the passage which was meant for going to the road in front of the house of the petitioner, and the allegation was that the place had become dirty and children were afraid to pass through that road because of the cattle tied there. Some protests were made to the owner of the

house, but he did not listen to it; rather he insisted that the petitioner should vacate his house. The second point is that the learned Sub-divisional Officer had called this petitioner on the night of the 13th June and asked him to vacate the house. I do not say that these allegations are correct or proved in the case; but these allegations were made and they are contained in the station diary entry. So there must be some sort of strained feeling between the learned Sub-Divisional officer and this petitioner. It is, perhaps, on that account that even the slightest provocation on the part of the petitioner led the Sub-Divisional Officer to draw up a contempt proceeding against the petitioner. It is also not known from the order whether the petitioner was arguing a case before the Sub-divisional Officer when this occurrence took place, or he was present there for some other work.

4. As regards the mandatory nature of the provisions of S. 481 of the Criminal P. C., the matter had once come up before the Judicial Commissioner of Tripura in the State v. Bhabesh Chandra Das, AIR 1963 Tripura 50, who observed that in a proceeding under S. 480, Criminal P. C., in respect of an alleged contempt under S. 228 of the Penal Code, it is necessary for the Court to state to the accused the particulars of the offence of which he is accused and to give an opportunity to him of explaining and correcting any misapprehension as to what had, in fact, been said or meant by him. It is only after affording this opportunity that the Court should make up its mind whether any intentional insult was offered. This opportunity is all the more necessary to be given in a summary proceeding under S. 480 as the Court itself is the prosecutor and the prosecution witness and there is to be no trial or examination of witnesses and the only opportunity for the accused to make a statement is in reply to the question put to him under S. 342, Criminal P. C. The failure to do so amounts to miscarriage of justice and is fatal to the proceedings. Similar observations were made in the case of Ramnath v. State, AIR 1963 All 59. I think the mandatory provisions of S. 481, Criminal P. C. should have been fully considered by the learned Sessions Judge, who has really side-tracked the issue. When all the facts and circumstances are taken into account, I think the learned Sub-Divisional Officer was rather too hasty in drawing up the proceeding and

deciding it at once. His order is, therefore, unsustainable.

5. In the result, the application in revision succeeds and is allowed and the order of conviction and sentence passed against the petitioner by the learned Sub-divisional Officer is set aside. The fine, if paid, shall be refunded to the petitioner.

Revision allowed.

1970 CRI. L. J. 1205 (Vol. 76, C. N. 302)

(PUNJAB & HARYANA HIGH COURT)

P. C. PANDIT, J.

Gurdit Singh and another, Petitioners
v. The State, Respondent.

Criminal Rev. No. 678 of 1967, D/- 12-6-1968, against order of Addl. S. J. Amritsar, D/- 11-7-1967.

(A) Criminal P. C. (1898), S. 439—New plea cannot be taken for the first time in High Court.

Where the accused persons urged for the first time in the High Court that they were not given proper opportunity by the trying magistrate to produce defence witnesses, without raising the plea either in the trial Court or in the first appellate Court while the record showed that such opportunity was given to them but they did not avail of it, the plea was held obviously an after-thought. (Para 6)

(B) Criminal P. C. (1898), S. 239 (d) — Joint trial — Different persons carrying milk going together — Refusing to allow Food Inspector to take samples — Can be tried together — Prevention of Food Adulteration Act (1954), S. 16 (1) (b).

Where the 3 accused persons carrying milk on their cycles for sale were intercepted by the Food Inspector at the same time to take samples of their milk and they did not allow him to do so, the offences were committed by them in the course of the same transaction and hence they could be tried together. (Para 8)

(C) Prevention of Food Adulteration Act (1954), S. 16 (1) (b) — Person preventing Food Inspector from taking sample — Is guilty of offence.

Since the Food Inspector is authorised under S. 10 to take sample of any article of food from any person selling it, the person preventing the Food Inspector from taking sample as authorized by the Act is guilty of the offence under S. 16 (1) (b) of the Act. (Para 10)

BN/DN/AS 14/70/GPC/D

Bahadur Singh with B. S. Shant, Advocates, for the Petitioners; Miss Sudarshan Kaur, for Advocate-General (Punjab), for the Respondent.

ORDER.—Gurdit Singh and Ajaib Singh of Jaspat and Surjan Dass of Verka, district Amritsar, have been convicted under S. 16 (1) (b) of the Prevention of Food Adulteration Act, 1954 and sentenced to undergo rigorous imprisonment for a period of six months and a fine of Rs. 1,000/- each and in default to undergo a further rigorous imprisonment of six months, both by the Judicial Magistrate, Tarn Taran and the learned Additional Sessions Judge, Amritsar. Against their convictions, they have come to this Court by means of this revision petition.

2. On 7th of August, 1966, at about 9 A. M., the petitioners were going on their cycles, each carrying two Valtohas of milk, near the crossing in the Adda Bazaar, Tarn Taran, the Government Food Inspector, Baldev Raj, stopped them and after having examined the specific gravity of the milk, he gave a notice in Form VI to each one of them and also filled up the receipt forms for the purchase of the milk. They refused to accept the notice and allow him to take any sample of the milk. Dr. Gurbax Singh, who was also tried along with the petitioners and later on acquitted by the learned Magistrate, after having been given the benefit of doubt, appeared on the scene and is alleged to have helped the petitioners in offering resistance, to the Food Inspector in seizing the sample. A truck is alleged to have come near the spot at that time. The petitioners then put their Valtohas thereon and left the place along with milk. Subsequently, the Food Inspector reported the matter to the Deputy Superintendent of Police, Tarn Taran and then filed a complaint in Court. The occurrence was witnessed by a number of persons including Sardari Lal, Teja Singh and Amar Chand, peon of the Food Inspector.

3. In their statements under S. 342 of the Code of Criminal Procedure, the petitioners denied the allegations made against them by the prosecution and stated that they had been falsely implicated. According to Gurdit Singh and Ajaib Singh, the Government Food Inspector was annoyed with them, because they had refused to give the illegal gratification to him on a monthly basis. Surjan Dass also claimed that a false case had been lodged against him. The petitioners, however, did not produce any defence evidence.

4. Both the Magistrate and the learned Additional Sessions Judge accepted the prosecution version and convicted the petitioners as mentioned above.

5. The first argument raised by the counsel for the petitioners was that the learned Magistrate had not given proper opportunity to the petitioners to produce the defence evidence. The statements of the petitioners were recorded on 20th of October, 1966 and thereafter they were asked to bring their witnesses on the next hearing i.e. 24th of October, 1966. On that date, the learned Magistrate closed the defence and did not give any further opportunity to the petitioners to produce their evidence. By this procedure, they had been greatly prejudiced.

6. No such plea was taken by the petitioners either before the learned Additional Sessions Judge or before the Judicial Magistrate. Even in the grounds of appeal, taken before the learned Additional Sessions Judge, no mention had been made of this point. It is stated by the Magistrate in his order that all the three petitioners offered to produce defence evidence, but they did not bring any on the day fixed for the purpose and consequently, no further opportunity was given to them. As I have said, no grievance was made against the closing of their defence by the learned Magistrate either in the grounds of appeal filed before the learned Additional Sessions Judge, or in the arguments before him. This plea obviously seems to be an after-thought.

7. The next contention of the learned counsel was that the petitioners were taking milk separately on their cycles and they had refused to allow the Government Food Inspector to take samples of that milk. Consequently, the offence committed by each of the petitioners was distinct and separate and as such they could not be tried jointly. They had been prejudiced due to the joint trial.

8. This contention was rightly repelled by the learned Additional Sessions Judge. According to S. 239 (d), Criminal P. C., all persons accused of different offences committed in the course of the same transaction could be charged and tried together. In the present case, the three petitioners were intercepted by the Food Inspector at the same time and he wanted to take the samples of their milk which they were carrying. All the petitioners did not allow the Food Inspector to take the said samples. Thus, the offences were

committed in the course of the same transaction and, therefore, the petitioners could be charged and tried together.

9. Lastly, it was submitted that if somebody simply refused to give sample to the Food Inspector, he was not liable to be convicted under S. 16 (1) (b) of the Prevention of Food Adulteration Act, 1954.

10. There is no substance in this argument as well, because according to S. 16 (1) (b) of the Act, if any person prevents a Food Inspector from taking a sample as authorised by the Act, he is guilty of the offence. Under S. 10 of the Act, a Food Inspector has the power to take sample of any article of food from any person selling such article or any person who was in the course of conveying, delivering or preparing to deliver such article to a purchaser or a consignee. Even if the petitioners were taking the milk to the Government Milk Plant at Verka as alleged by them, the Food Inspector was authorised by the Act to take the samples from them, within the meaning of S. 10 of the Act, and if they prevented him from doing so, they were guilty under S. 16 (1) (b).

11. The result is that this petition fails and is dismissed.

Petition dismissed.

1970 CRI. L. J. 1206 (Vol. 76, C. N. 303)

(RAJASTHAN HIGH COURT)

L. S. MEHTA AND C. M. LODHA, JJ.

State of Rajasthan, Appellant v. Chhuttanlal and others, Respondents.

Criminal Appeal No. 309 of 1964, D/- 16-4-1969, against judgment of Add., S. J. Jaipur, D/- 28-8-1963.

(A) Penal Code (1860), S. 120B — Criminal conspiracy — Direct evidence — Seldom available — Circumstantial evidence — Must be looked into.

In case of criminal conspiracy direct evidence will be seldom forthcoming and it will be necessary to look at the circumstances to see whether the conspiracy actually existed. In alternative a criminal conspiracy is generally a matter of inference, deducible from certain criminal acts of the parties concerned.

(Paras 8 to 20)

(B) Evidence Act (1872) Ss. 133, 114 — Evidence of approver — Dependability — Tests to be satisfied — Conviction on his

KM/BN/F432/69/MNT/B.

testimony alone—Not safe under S. 114 of the Act.

An accomplice is competent to give evidence under S. 133 of the Act but according to S. 114 of the Act it is unsafe to convict on his testimony alone.

The Court in the first instance has to satisfy itself that the statement of the approver is credible in itself and that there is evidence other than the statement of the approver that the approver himself has taken part in the crime. After this court is satisfied about these two things the Court has to seek corroboration of the approver's evidence with respect to the part of the other accused persons in the crime and this evidence has to be of such a nature as to connect the other accused with the crime. (1861) 9 Cox C C 32 and AIR 1949 P C 257 and 1916-2 K B 658 and AIR 1963 S C 599 and AIR 1966 SC 1273, Rel. on. (Para 16)

(C) Evidence Act (1872), Ss. 3, 30 — Confessional statement of co-accused — Evidentiary value of — Not a substantive evidence under S. 3 — Can be treated as evidence in a general way under S. 30.

The confession of co-accused cannot be treated as a substantive evidence as defined in S. 3 and can be pressed into service only when the court is inclined to accept other evidence and feel the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. As a result of provisions of S. 30 it has to be treated as amounting to an evidence in a general way. AIR 1964 S C 1184, Rel. on. (Para 21)

(D) Criminal Procedure Code (1898), S. 164—Recording of confession—Necessary requirements — Confession not recorded strictly in accordance with law and not voluntary — Reliance cannot be placed upon it.

The act of recording confession is a very solemn act and in discharging duties under S. 164 the Magistrate must take care to see that the requirements of sub-s. (3) of the section are fully satisfied. It would be necessary in every case to put questions prescribed by the High Court circular the object of which is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or procedure.

Where the confession recorded did not appear to be voluntary nor was it properly recorded strictly in accordance with law nor did it appear to be in harmony with prosecution version it was held that

no reliance could be placed upon it. AIR 1957 SC 637 and AIR 1956 SC 56, Rel. on. (Paras 23, 24)

(E) Penal Code (1860), S. 489-D—Litho stone recovered from the house of the accused — Proof that it was not used in the commission of the offence — No link between its possession and preparation of currency notes — Accused cannot be convicted under the section. (Para 25)

Cases Referred : Chronological Paras
 (1966) AIR 1966 S C 1273 (V 53)=
 1966 Cri L J 949, Saravanabhavan
 v. State of Madras 16
 (1964) AIR 1964 S C 1184 (V 51)=
 1964 (2) Cri L J 344, Haricharan
 v. State of Bihar 21
 (1963) AIR 1963 S C 599 (V 50)=
 1963 (1) Cri L J 489, Bhiwa v.
 State of Maharashtra 10, 15
 (1957) AIR 1957 S C 637 (V 44)=
 1957 Cri L J 1014, Sarwan Singh
 v. State of Punjab 23
 (1956) AIR 1956 S C 56 (V 43)=
 1956 Cri L J 152, Nathu v. State
 of U. P. 22
 (1949) AIR 1949 P C 257 (V 36)=
 50 Cri L J 872, Bhuboni Sahu v.
 King 10, 15
 (1916) 1916-2 K B 658=86 L J K B
 28, R v. Baskerville 10, 15
 (1961) 9 Cox C. C. 32, R. v. Boyes 10, 15

M. L. Shrimal, Dy. G. A., for State;
 C. L. Agarwal and R. S. Kejriwal, for
 Respondent No. 3; O. C. Chatterjee and
 N. L. Tribriwal, for Respondent No. 1;
 R. S. Purohit, for Respondent No. 2.

JUDGMENT — Briefly narrated, the prosecution story is as follows. On 31st October 1960, the Agent, State Bank of India, Jaipur, sent to the Superintendent of Police, Jaipur, two forged currency notes, one of the denomination of Rs. 100/- received by the Bank from one Manakchand and the other of the denomination of Rs. 10/- produced in the Bank by Banshi Dhar Satyanarain, Jaipur. The District Superintendent of Police sent these notes to the Currency Note Press, Nasik Road, for examination. Mr. B. L. Kulthe, P. W. 13, Assistant Supervisor and Expert in Detection of Forged Currency and Bank Notes, Studio, India Security Press, sent his reports No. 39 (C/L/2) 1324 and No. 39 (X/H/3) 1323 both dated 10th May 1961, stating therein that the two notes were forged ones. Thereafter the police registered a case at the Police Station, Manak Chowk, Jaipur, under S. 489-B, Indian Penal Code, on

21st June 1961. Ram Pratap, P. W. 6, S. I. started investigation. A. R. Khan, P. W. 29, Inspector, C. I. D., also joined it subsequently. P. W. 2 Bhanwar Singh, Clerk Incharge of the Counterfeit Coins section, C. I. D. Branch Jaipur was informed by his friend P. W. 1 Hanuman that there existed in Jaipur a gang, engaged in counterfeiting currency notes. The accused Chhuttanlal was the active member of that gang. P. W. 2 Bhanwar Singh produced Hanuman before Mr. N. C. Dutta, Superintendent of Police, C. I. D. (Crimes), P. W. 28, and Mr. U. N. Misra, Deputy S. P. (C. I. D.) P. W. 25. Mr. Dutta told Bhanwar Singh and Hanuman to be vigilant and to establish contact with the members of the gang and find out its all possible activities or modus operandi. He also asked Mr. U. N. Mishra to render every possible assistance to Bhanwar Singh and Hanuman in the matter.

Bhanwar Singh and Hanuman thereafter got in touch with the accused Chhuttanlal. Chhuttanlal, in the course of their contact, told them that he was capable of counterfeiting currency notes. These two persons then, under false pretext, joined the gang as partners. Bhanwar Singh was introduced to the gang as a Cashier in the P. W. D. Chhuttanlal agreed to forge the currency notes. The accused Shyam Sunder and P. W. 2 Bhanwar Singh undertook to finance the business. It was also agreed that the accounts of the partnership would be maintained by the accused Chhuttanlal, who was to get one half share in the profits. One fourth share of the profit would go to Shyam Sunder. The residuary one fourth share was to be assigned to P. W. 1 Hanuman and P. W. 2 Bhanwar Singh jointly. Bhanwar Singh parted with Rs. 200/- and two zinc plates to the accused Chhuttanlal. Accused Shyam Sunder gave Rs. 200/-, as also some powder and acid for etching purpose. Accused Chhuttanlal then got prepared currency designs with the zinc plates which are marked Exs. 20, 21-A and 21-B, through goldsmith Omprakash, P. W. 4, an employee of the firm Jaipur Printers. The papers for counterfeiting the notes were supplied by Govind Narain. Forged notes were got printed with the help of block Exs. 21, 21-A and 21-B by the accused Shyam Sunder through some press. Accused Shyam Sunder kept some of the printed notes with him at his place and made over a few to the accused Chhuttanlal to design them after giving finishing touches,

so that they might look like genuine currency notes. Accused Chhuttanlal finally prepared some notes and gave them to the accused Amar and Indermal for use. He also gave a few notes to the accused Ayal Das (approver). On receipt of information from Hanuman, P. W. 1, the police deputed P. W. 17 Tilumal to watch the specific activities of Ayal Dass.

On 24th June 1961, Bhanwar Singh informed Mr. N. C. Dutt S. P. (C. I. D.) that the currency notes had already been counterfeited and were ready for circulation in the market. On 28th June 1961, Tilumal supplied information to Mr. Dutt that Ayal Das had left for Ajmer by bus presumably with the object of circulating counterfeit notes. Mr. Dutt then personally left for Ajmer with some Police Officers as also with Tilumal. The police recovered two currency notes of the denomination of Rs. 100/- each, from the possession of Ayal Das, under recovery memo Ex. P.-10, dated 28th June 1961. On 28th June 1961, accused Chhuttanlal was arrested. Simultaneous raids were carried out in the house of the accused Chhuttanlal and Shyam Sunder. 166 counterfeit currency notes of the denomination of Rs. 100/- each and certain instruments and materials, meant for counterfeiting currency notes were recovered at the house of Chhuttanlal, under memo Ex. P. 12, dated June 29, 1961. Four of these notes were complete and the residual were incomplete. The police also recovered 65 forged currency notes of the denomination of Rs. 100/- each from the house of the accused Shyam Sunder. Accused Govind Narain was arrested on July 10, 1961. He furnished information to the police that two litho-stones meant for forging currency notes, were available at his house. That information was reduced to writing and is marked Ex. P-16, dated July 10, 1961. In pursuance of that information, the police recovered two litho stones from the house of the accused Govind Narain, under memo Ex. P-17 of the same date. The police also got recorded the confessional statement of the accused Govind Narain under S. 164, Criminal P. C., on July 22, 1961: vide Ex. P-8. During the investigation it was found that the accused Chhuttanlal had been previously convicted for offences under Ss. 489A and 120B, Penal Code, by the Special Tribunal, Jodhpur, in March 1936, and under S. 489A, by the High Court of Hyderabad in June 1932. It was further found that the accused Chhuttanlal some time before June 1961,

had counterfeited currency notes of the denominations of Rs. 5/- and Rs. 100/- each by using litho-stones recovered from the house of accused Govind Narain and with the help of the accused Amar, Indermal and Ayal Das uttered them in the market.

2. As the stock of litho-stone notes had been exhausted and as it took pretty long time in counterfeiting currency notes by the litho-process, it was conspired by the accused persons to counterfeit currency notes by getting them printed in some press with the help of blocks. The accused Amar and Indermal were also arrested. Forged notes, other materials and instruments recovered from the accused Chhuttanlal, Shyam Sunder and Govindnarain as also from the accused Ayal Das were sent by the police to the Currency Notes Press, Nasik Road, for expert opinion. Mr. B. N. Kulthe, Assistant Supervisor and Expert in Detection of Forged Currency and Bank Notes, sent his reports Ex. P-5 (39/C/J/3) 8764 dated December 8, 1961, Ex. P-6 (39/C/J/3) 8772, dated December 8, 1961, Ex. P-7 (39/C/L/2) 8768, dated December 8, 1961 and Ex. P-7A (39/8776), dated December 8, 1961. On conclusion of investigation, all the six accused persons were challaned in the Court of First Class Magistrate, Jaipur, for offences under Ss. 489B and 120B, Penal Code. Accused Chhuttanlal, being a previous convict for similar offences was further challaned under S. 75, Penal Code. The said Magistrate conducted preliminary inquiry in accordance with the provisions of S. 207A, Criminal P. C., and committed the accused to the Court of Sessions Judge, Jaipur City, wherefrom the case was transferred to the Court of the Additional Sessions Judge, Jaipur City No. 2 for trial.

3. The accused pleaded not guilty to the various charges under the aforesaid sections of the Indian Penal Code.

4. In support of its case, the prosecution examined 29 witnesses. In his statement, recorded under S. 342, Criminal P. C., the accused Shyam Sunder made a total denial of the offences with which he stood charged. He has deposed that Hanuman is on inimical terms with him. He had had litigation with Hanuman's friend Gulab Chand. He has also stated that other witnesses gave false statements against him. The accused Govind Narain denied to have committed any offence. He retracted his confessional statement, dated September 22, 1961, marked Ex. P-8.

Amar besides denying the offences with which he was charged, said that Ayaldas owed money to him, and therefore, he gave an incorrect statement against him. He has also said that Ayaldas made a wrong statement and so also Nanagram. Chhuttanlal denied to have committed any offence. He, however, admitted that he is a previous convict. Hanuman and Bhanwar Singh came to him under the pretext of getting certain curtains repaired and they put a bag with him. The satchel contained the materials recovered from his possession. As the accused Indermal died after the appeal having been preferred in this Court, it is not necessary to refer to his statement here. The accused Shyam Sunder in his defence examined 14 witnesses. Chhuttanlal examined one. Govind Narain also produced one defence witness.

5. In the course of trial, the prosecution submitted an application on February 1, 1963, to the trial court for tendering pardon to the accused Ayaldas, under S. 338, Criminal P. C., with a view to obtaining his evidence as he was directly concerned in the activities of the gang. Learned Additional Sessions Judge, Jaipur City, by his order, dated February 19, 1963, acceded to the request of the prosecution and tendered pardon to Ayaldas, on the condition of his making a full and true disclosure of all the relevant circumstances relating to the offences. Consequently the name of Ayaldas was removed from the array of the accused persons and he was examined as a prosecution witness as P. W. 27. By his judgment, dated August 28, 1963, the Additional Sessions Judge, Jaipur City, acquitted all the accused of the offence under S. 120B, I. P. C. He acquitted Shyam Sunder, Amar, Indermal and Govind Narain of the other offences with which they were indicted. The accused Chhuttanlal was convicted under Ss 489A, 489B, 489C and 489D, I. P. C., and sentenced to undergo rigorous imprisonment for five years for each of the offence. All the sentences were directed to run concurrently. The recovered materials were ordered to be confiscated and sent to the Government of India, Currency Notes Press Nasik, after the expiry of the period of appeal. Dissatisfied with the above judgment, the State Government has filed this appeal.

6. Learned Deputy Government Advocate has strenuously argued that the offence of criminal conspiracy under S. 120B, I. P. C. stands fully established

against the accused Chhuttanlal, Govind Narain, Shyam Sunder and Amar and, therefore the order of acquittal passed by the trial court in their favour should be quashed, and they should be punished adequately. Counsel for the State Government further urged that Govind Narain should also be convicted of offence under S. 489D, I. P. C. and appropriate sentence be awarded to him. Learned counsel for the accused Chhuttanlal, Govind Narain and Shyam Sunder supported the judgment of the trial court. Mr. P. N. Dutta, counsel for the accused Amar, withdrew from the case on the ground that he had had no instructions from his client to argue it out. Amar did not put in any personal appearance. As stated above, Indermal died in the course of the pendency of the appeal.

7. The points for determination in this case are: (1) whether the accused Chhuttanlal, Govind Narain, Shyam Sunder and Amar are guilty of the offence under S. 120B, I. P. C., and (2) whether the accused Govind Narain has been wrongly acquitted of the offence under S. 489D, I. P. C.

8. To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means, provided that where the agreement is other than one to commit an offence, the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. Where the agreement is one to do or cause to be done an act which is itself an offence, no overt act, i. e., any act done by one of the parties to the agreement in pursuance of it, need be proved. The crime of criminal conspiracy is established once such an agreement is proved. Hence where the conspiracy alleged is one to commit a series of crimes, mere proof of an agreement between the accused is enough to sustain a conviction and proof of overt act is not strictly required. In case of criminal conspiracy direct evidence will be seldom forthcoming and it will be necessary to look at the circumstances to see whether the conspiracy actually existed. In alternative words, a conspiracy is generally a matter of inference, deducible from certain criminal acts of the parties concerned.

9. It is now to be seen whether in the light of the above background, there exists

specific proof against the accused persons that they individually participated in a particular design to do a particular criminal thing.

10-14. (The Court considered the evidence of search and the report made by the Superintendent of Police and held it untrustworthy and not free from doubt and proceeded).

15. It is a settled law that an accomplice is competent to give evidence under S. 133, Evidence Act. But according to S. 114, Illustration (b), Evidence Act, it is always unsafe to convict on his testimony alone. The court will, as a matter of practice, not accept the evidence of such witness without corroboration in material particulars. There should be corroboration of the approver in material particulars and qua each accused: vide *R. v. Boyes* (1861) 9 Cox. C. C. 32, *Bhuboni Sahu v. King*, AIR 1949 PC 257, *R. v. Baskerville*, (1916) 2 K B 658 and *Bhiva v. State of Maharashtra*, AIR 1963 S C 599.

16. It is also well settled that the court in the first instance has to satisfy itself that the statement of the approver is credible in itself and that there is evidence other than the statement of the approver that the approver himself has taken part in the crime. Secondly, after the court is satisfied that the approver's statement is credible and his part of the crime is corroborated by other evidence, the court seeks corroboration of the approver's evidence with respect to the part of the other accused persons in the crime and this evidence has to be of such a nature as to connect the other accused with the crime: vide *Saravanabhavan v. State of Madras*, AIR 1966 S C 1273. Thus, it is to be remembered that before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver, then there is an end of the matter. In other words, approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness. If this test is satisfied, the second test is that his evidence receives sufficient corroboration. This test is special to the case of weak or tainted evidence like that of an approver.

17-19. Court then considered the evidence of the approver and other witnesses and proceeded further.)

20. From the evidence discussed above, it cannot be said that the prosecution has proved, beyond reasonable doubt, that there existed a party which indulged in criminal conspiracy to commit offences relating to currency notes.

21. We may now deal with Govind Narain's confessional statement, marked Ex. P-8, dated July 22, 1961. In this connection, it may be pointed out that as a result of the provisions contained in S. 30 of the Evidence Act, confession of a co-accused has to be treated as amounting to evidence in a general way. It cannot be said to be an evidence as defined by S. 3 of the Evidence Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. Thus, the confession of a co-accused cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feel the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence: vide *Haricharan v. State of Bihar*, AIR 1964 S C 1184.

22. Now it is to be seen how far the confessional statement of the accused Govind Narain Ex. P-8, dated July 22, 1961, can be believed in. Govind Narain was in the police custody from July 10, 1961, to July 21, 1961. Recoveries from his house had already been made on July 10, 1961, under memo Ex. P. 17. It is in the judgment of the trial court that Govind Narain was kept in a separate custody with effect from 10th July, 1961, onwards. Abdul Rashid P. W. 29, Inspector C. I. D., has stated that Govind Narain remained in his custody. Neither P. W. 15 Deva Singh nor P. W. 29 Abdul Rashid has made any attempt to explain this unusual circumstance of keeping Govind Narain in a separate custody. It was the duty of the prosecution to positively establish that the confession was voluntary and for that purpose it was necessary to prove the circumstance under which this unusual step was taken. There being no such evidence, we are unable to act upon the confessional state-

ment Ex. P-8 as a voluntary confession. In this connection, reference is made to *Nathu v. State of Uttar Pradesh*, AIR 1956 S C 56. In that case appellant Nathu was kept in separate custody and thereafter he made a confession. No explanation was offered by the prosecution for keeping the appellant in a separate custody. Their Lordships held that in the unusual circumstances of the case, the confessional statement was not dependable.

In this case, it is given in the confession that blocks were prepared at the house of the accused Govind Narain and then they were taken along with the litho stones to Jaipur. Hanuman P. W. 1 on the other hand has said that on the litho stones two photos of children were engraved on the one side and on its reverse 'Zamela' was engraved. Contrary to this, Om Prakash P. W. 4 has said that he prepared or cut the zinc plates. Om Prakash has also said that this act was done in the presence of Chhuttanlal and Shyam Sunder. This fact is not mentioned in the confessional statement. In the confessional statement it is described that Chhuttan showed front portion of the block to Shyam Sunder. As against this, Om Prakash says that blocks were cut in the presence of Shyam Sunder and Govind Narain. In the confessional statement it is given that Ayaldas Singhi purchased forged notes of the denomination of Rs. 100 in lieu of Rs. 50 each. At that time Indermal and Shyam Sunder were not there. Ayaldas says that Indermal, Govind Narain and Shyam Sunder were there at that time. Again, Ayaldas has stated that Shyam Sunder brought two bundles of notes, one bundle was given to Chhuttan. Shyam Sunder was told by Chhuttan that one bundle should be kept with him and that he would take the same from him as and when required. In the confessional statement it is mentioned that Shyam Sunder brought about 150 forms of the currency notes and the same were given by him to Chhuttan. Shyam Sunder further said that some currency notes were lying with him at his house and Chhuttan told Shyam Sunder to get printed a thousand currency notes more. These discrepancies demonstrate that there are glaring inconsistencies between the prosecution story as unfolded by its witnesses and the confessional statement. No reliance can, therefore, be placed upon the retracted confessional statement. It may also be mentioned here that Shri S. N. Dave, P. W. 3, Magistrate, First Class, Jaipur, did not observe any of

the formalities in accordance with the provisions of S. 164, read with S. 364, Criminal P. C. He did not make a note that he told the accused that he was a Magistrate and that he was not bound to make a statement and that if he made it, the same could be used against him. He also did not ask Govind Narain as to when he was arrested. He also did not make a note that after the statement was recorded, he would not be sent back to the police custody. On July 22, 1961, when the confessional statement was being recorded, he did not give any time to Govind Narain to reflect and make up his mind. He started recording the confessional statement in his chamber.

23. The act of recording confession under S. 64, Criminal P. C. is a very solemn act and in discharging duties under the said section, the Magistrate must take care to see that the requirements of sub-s. (3) of S. 164, Criminal P. C. are fully satisfied. It would of course be necessary in every case to put the questions prescribed by the High Court circular and the questions intended to be put should not be allowed to become a mere matter of mechanical inquiry. The whole object of putting questions to an accused person is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise, vide *Sarwan Singh v. State of Punjab*, AIR 1957 S C 637.

24. In the present case the confession does not appear to be voluntary nor was it properly recorded strictly in accordance with law, nor does the confessional statement appear to be in harmony with the prosecution version. No reliance, therefore, can be put upon such a confessional statement.

25. Seeing this case in its varied aspects and from all possible angles of view, there remains a doubt that the respondents are guilty of the offence under S. 120B, Penal Code. In a criminal case whenever there is a doubt, its benefit should go to the accused. It may also be mentioned here that since the recovery of the litho-stones from the possession of the accused Govind Narain does not establish a firm link with the preparation of the forged currency notes, the accused Govind Narain cannot be held guilty under S. 489D, Penal Code.

In the result, this appeal having no force stands dismissed.

Appeal dismissed.

1970 CRI. L. J. 1212 (Vol. 76, C. N. 304)

(TRIPURA J. C.'s COURT)

R. S. BINDRA J. C.

Digendra Kumar Deb, Petitioner v. Tarini Charan Dey, Respondent.

Criminal Revn. No. 22 of 1965, D/- 23-10-1969, against order of Addl. S. J. Tripura, D/- 7.6.1965.

(A) Criminal P. C. (1898), S. 439 — Concurrent findings of fact of Courts below founded on dependable evidence cannot be assailed in revision. (Para 3)

(B) Criminal P. C. (1898), Ss. 147 and 133—Application complaining of obstruction to public pathway — Allegation of likelihood of breach of peace also found to be made out — Case falls under S. 147 and not under S. 133.

Where the application for a direction to the opposite party to remove the obstruction set up by him on a public pathway which was being used by the applicant for egress from and ingress to his homestead distinctly alleges that the obstruction set up was likely to cause a breach of peace between the two parties and the Courts also find that there was a likelihood of such breach of peace between them, the case clearly falls within the ambit of S. 147 and is not covered by the provisions of S. 133. It is true that provisions of the two sections cover common field to the extent that they embrace cases of nuisance over public paths and roads. However, S. 147, in addition, also embraces cases of the nature of private nuisance for it includes, inter alia, a case involving infringement of the right of easement which obviously can be claimed by an individual. Further, the most salient distinction between the two sections is that to bring the case under S. 147 it has to be established that the dispute between the parties is likely to cause a breach of the peace, while this is obviously not an essential ingredient of S. 133. (Para 4)

(C) Criminal P. C. (1898), S. 147 and Sch. V Form XXIV—Preliminary order not in form No. XXIV of Sch. V—Does not vitiate proceedings — Form refers to final and not the preliminary order. (Para 5)

(D) Criminal P. C. (1893), Ss. 147 and 439 — Defect in preliminary order — No revision filed against the preliminary order—Order cannot be assailed in revision against final order particularly so when there is nothing to establish that

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the party had been prejudiced by the irregularity in the preliminary order : AIR 1949 All 616, Rel. on. (Para 5)

(E) Criminal P. C. (1898), S. 147 — Criminal Court acting under section has, in view of sub-s. (2) also the power to order removal of obstruction while declaring the right of way in a party : AIR 1964 Manipur 24, Followed. ; AIR 1959 Mad 28 and AIR 1951 All 238, Rel. on. ; AIR 1965 Pat 17, Dissented from. (Para 6)

(F) Civil P. C. (1908), Pre.—Interpretation of Statutes — Duty of Court — Intention of legislature must be given effect even if legislature has failed to clothe its intention in precise and scientific phraseology.

It may be that in certain cases the Legislature fails to clothe its intention in very precise and scientific phraseology. However, it is the primary function of the Courts to ascertain the exact intention of the Legislature, of course from the words used by it, and then to give effect to that intention, unless the words of the statute stand in the way either explicitly or by necessary implication.

(Para 6)

(G) Criminal P. C. (1898), Ss. 148 (3) and 147—Costs incurred by any party in proceeding under S. 147—Magistrate has power to direct that such costs shall be paid. (Para 8)

Cases Referred : Chronological Paras

(1965) AIR 1965 Pat 17 (V 52) :

1965 (1) Cri L J 64, Ram Ishwar Singh v. Rambachan Singh 6

(1964) AIR 1964 Manipur 24 (V 51) :

1964 (1) Cri L J 676, W. Gulap Singh v. Moirangthem Radha Devi 6

(1959) AIR 1959 Mad 28 (V 46) :

1959 Cri L J 52, Angappa v. Krishnaswami 7

(1951) AIR 1951 All 238 (V 38) : 52

Cri L J 795 (FB), Abdul Wahab v. Mohd. Hamidullah 7

(1949) AIR 1949 All 616 (V 36) : 50

Cri L J 929, Qumaruddin v. Mushtaq Ahmad 5

N. L. Choudhury, Advocate, for Petitioner ; H. Dutta, Advocate, for Respondent.

ORDER. — This revision petition by Digendra Kumar Deb arises out of an application made by Tarani Charan Dey, under S. 147 of the Criminal P. C., praying that Digendra Kumar Deb be directed to remove obstruction in the shape of a fencing set up by him over a public path-

way which he (Tarini Charan Dey) had been using for egress from and ingress to his homestead situate on the west of that pathway. The preliminary order was passed on 8th August 1960. After perusing the written statements filed by the parties and going through the evidence led by them, Shri S. C. Das, Magistrate first Class, Kailashahar, passed the final order on 23rd April 1962, holding that public road runs over the enclosed part of the land, that Tarini Charan Dey had been exercising his right of way over that public road within three months next preceding the preliminary order, and that the action of Digendra Kumar Deb in obstructing the pathway was likely to result in breach of peace. The Magistrate, therefore, directed the removal of the fencing set up by Digendra Kumar Deb and prohibited him from causing any obstruction in exercise of the right of pathway by Tarini Charan Dey. A period of 15 days was given to Digendra Kumar Deb for removal of the fencing and he was also called upon to pay Rs. 10/- by way of costs to Tarini Charan Dey.

2. Having felt aggrieved with the order of the Magistrate, Digendra Kumar Deb filed a revision petition in the Court of the Sessions Judge. That petition came up for hearing before Shri S. B. Laskar, the Additional Sessions Judge, who, by his order dated 7-6-1965, dismissed the same on confirming all the findings reached by the Magistrate. The present revision petition under Ss. 439 and 561A of the Code is directed against the order of Shri S. B. Laskar.

3. Shri N. L. Choudhury, appearing for the petitioner, canvassed three points to support the contention that the order made by the Magistrate and confirmed by the Sessions Judge is bad in law and so has to be quashed. Firstly, it was urged that the proper course for the Magistrate to follow in the circumstances of the case was to proceed under S. 133 rather under S. 147 of the Code. The next point taken was that while exercising power under S. 147 the Magistrate had no jurisdiction to direct removal of the obstruction set up by Digendra Kumar Deb over the disputed piece of land. Lastly, it was contended that an order for costs is wholly unjustified in respect of proceedings under S. 147.

In fairness to Shri Choudhury it must be stated that he was also critical of the findings, reached by the two Courts below, that a public road runs through

the land over which Digendra Kumar Deb is alleged to have set up the fencing and that Tarini Charan Dey had been using that pathway for going to and coming out of his homestead. This criticism of Shri Choudhury is without merit. It is proved from the statements of the witnesses examined by Digendra Kumar Deb himself that a public road runs through the area fenced by Digendra Kumar Deb. (His Honour then discussed the evidence and proceeded.) Hence, I overrule the objection of Shri Choudhury that the Magistrate and the Sessions Judge had gone wrong in holding that a public road runs over the land in dispute and that Tarini Charan Dey had been using that road for going to and coming out of his house on its west. Moreover, the concurrent findings of the Courts below to that effect, founded as they are on dependable evidence, cannot be assailed in this revision petition.

4. The contention of Shri Choudhury that the Magistrate would have been well advised to take recourse to the provisions of S. 133 in preference to those of S. 147 is equally untenable. It is correct that provisions of the two sections cover common field to the extent that they embrace cases of nuisance over public paths and roads. However, S. 147, in addition, also embraces cases of the nature of private nuisance for it includes, *inter alia*, a case involving infringement of the right of easement which obviously can be claimed by an individual. Further, the most salient distinction between the two sections is that to bring the case under S. 147 it has to be established that the dispute between the parties is likely to cause a breach of the peace, while this is obviously not an essential ingredient of S. 133. Since in the instant case there was a distinct allegation by Tarini Charan Dey that the obstruction set up by Digendra Kumar Deb was likely to cause a breach of peace between the two parties, and since the Courts below have held that there was a likelihood of breach of peace between them, the case clearly falls within the ambit of S. 147 and is not covered by the provisions of S. 133.

5. Shri Choudhury also contended, though in a luke-warm manner, that the preliminary order passed by the Magistrate on 8.8.1960, being not in the form No. XXIV, Schedule V, Criminal Procedure Code, the entire proceedings stand vitiated. Form No. XXIV, it will be noticed, refers to the final and not the

preliminary order passed under S. 147 and as such the point raised by Shri Choudhury is without any substance. Even if the preliminary order passed by the Magistrate was defective in some way, it is not open to Digendra Kumar Deb to cavil at it, while coming in revision against the final order passed under S. 147. If he had any genuine grievance arising out of the preliminary order, he should have immediately filed a revision petition against that order and not waited until the final order was passed. It was held in the case of Qamaruddin v. Mushtaq Ahmad, AIR 1949 All 616, that if in compliance with an irregular preliminary order the parties put in appearance before the Magistrate without challenging the same in revision, they cannot assail that order in a revision, filed against the final order, and this is specially so when there is nothing to establish that the party had been prejudiced by the alleged irregularity in the preliminary order. Shri Choudhury could not mention any irregularity respecting the preliminary order excepting the one noted above, and which has been found to be without any merit, nor was he able to satisfy this Court that any prejudice had been suffered by his client. Therefore, the objection raised by him must be negatived.

6. This brings us to the consideration of the point whether while passing a final order under S. 147 (2) the Magistrate has the authority to direct the removal of the obstruction set up by the opposite party over the land in dispute, apart from making an order prohibiting any interference with the exercise of right over that land by the aggrieved party. On the authority of AIR 1965 Pat 17, Ram Ishwar Singh v. Rambachan Singh, it was contended by Shri Choudhury that the Magistrate can only pass an order prohibiting an interference and not one for actual removal of the obstruction. Shri H. Dutta, representing the respondent herein, cited a large number of authorities of the various High Courts holding that in a proper case the Magistrate can order under sub-s. (2) of S. 147 the removal of the obstruction standing in the way of the exercise of the right proved to exist in favour of the aggrieved party.

Shri Choudhury conceded that there is sharp conflict of judicial opinion in India over the question whether the Magistrate is possessed of the power to direct removal of the obstruction. A perusal of the authorities cited at the bar by the parties

counsel indicates that the High Courts of Lahore, Madras, Allahabad, Assam and Mysore, as also the Judicial Commissioner's Court at Manipur, are of the view that such an order is within the contemplation of sub-s. (2) of S. 147, while the High Courts of Calcutta, Bombay, Patna and Nagpur have expressed the contrary opinion.

For the last 20 years or so the Judicial Commissioners' Courts for Manipur and Tripura have been presided over by the same officer. Therefore, the view taken by the Judicial Commissioner of Manipur has to be respected by this Court unless for reasons stated it wants to depart from that view. In the case of *W. Gulap Singh v. Moirangthem Radha Deyi*, A I R 1964 Manipur 24, Tirumalpad, J. C., held that after perusal of the various authorities cited before him, he agreed with the view expressed by the Assam, Madras and Allahabad High Courts that a criminal Court acting under S. 147 has the power to order removal of obstruction while declaring the right of way in favour of a party. The conclusion reached by me on scrutiny of the relevant authorities is also identical. In my opinion, that view is not only the practical view to take but it is also in accord with the phraseology of sub section (2) of S. 147.

That sub-section provides,

"If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

In the cases where interference has taken the shape of physical obstruction, the prohibition of such interference necessarily implies a direction for removal of that obstruction. Any other view would make the provisions of S. 147 a dead letter in those cases where interference has taken the shape of physical obstruction. The aggrieved party may have scored success after fighting a protracted and expensive litigation and yet that success may not be of any practical value to him if the physical obstruction cannot be removed pursuant to an order made under sub-s. (2) of S. 147. The Legislature could not have envisaged such an eventuality with equanimity for we know that the Legislature always endeavours to act in a practical manner.

It may be that in certain cases the Legislature fails to clothe its intention in very precise and scientific phraseology. However, it is the primary function of the Courts to ascertain the exact intention of the Legislature, of course, from the

words used by it, and then to give effect to that intention, unless the words of the statute stand in the way either explicitly or by necessary implication. I feel that nothing said in sub-s. (2) of S. 147 interdicts the Magistrate from directing removal of physical obstruction set up by the party complained against. Such a direction would tantamount to "prohibiting any interference" with the exercise of the right claimed by the aggrieved party. It would also lend force and vitality to the legislative intendment, besides imparting practical shape to it. Any other interpretation of S. 147 (2) would make the provision otiose in cases of present variety though such cases without doubt fall within the ambit of section 147.

7. In the case of *Angappa v. Krishnaswami*, AIR 1959 Mad 28, it was held, while interpreting sub-s. (2) of S. 147, that a negative order can include a positive direction to make the prohibition effective and useful. If an order is to be effective, even though it be of a prohibitive nature, whatever is incidental to the prohibition should also be available to the Magistrate to pass in the circumstances of each case. It was further observed that any interference would in very fit cases include the removal of any obstruction that has already been placed in the exercise of the right by the aggrieved party and that it need not have reference merely to any interference that might occur in the future, and which might not possibly occur at all in view of the order issued by the Magistrate.

A Full Bench of the Allahabad High Court held in the case of *Abdul Wahab v. Mohd. Hamid Ullah*, A I R 1951 All 238 (FB), that a power to effectuate a certain object which the Legislature has in view must be construed as implying the existence of all such ancillary powers as are necessary for carrying out the intention of the Legislature and effectuating the object in view. It was observed further that in order to make a prohibitory order effective, the Magistrate has power to pass an order under sub-s. (2) of S. 147 for the removal of an obstruction, if without its removal the prohibitory order cannot be effectively enforced. I respectfully agree with the observations made by the Madras and Allahabad High Courts if only because they give effective and practical shape to the order contemplated by sub-s. (2) of S. 147.

8. The last point urged by Shri Choudhury was that the Magistrate had no

authority to impose costs of Rs. 10/- on Digendra Kumar Deb. This point is equally devoid of merit. Sub-section (3) of S. 148 of the Code prescribes that when any costs have been incurred by any party to a proceeding under Chap. 11, the Magistrate passing a decision under sections 145, 146 or 147 may direct by whom such costs shall be paid. Therefore, the Magistrate was well within his rights in imposing the costs on Digendra Kumar Deb.

9. As a result, the revision petition fails and so it is hereby rejected.

Petition rejected.

1970 CRI. L. J. 1216 (Vol. 76, C. N. 305) =
AIR 1970 BOMBAY 324 (V 57 C 57)

VAIDYA, J.

M. R. Pillai, Petitioner v. M/s. Motilal Vrijbhukhandas and others, Respondents.

Criminal Revn. Applns. Nos. 282 to 284, 357 to 360 and 363 of 1969, D/- 24-4-1969.

(A) Constitution of India, Article 14 — Equality before Law — Collection of evidence against accused and filing charge-sheet — Discretionary with police — Prosecution of some accused and discharge of others on the basis of evidence collected by police — Not discriminatory.

The police have a discretion in collecting evidence against the accused and in filing a chargesheet. A court cannot compel the police to file a chargesheet if the police come and tell the Court that they are unable to prosecute some persons because they have no evidence. It cannot be said that they have discriminated against the other accused against whom they have collected evidence. Even if the police are wrong and the persons against whom the police did not collect evidence had also committed offences, it cannot be suggested that the police have discriminated against the accused because they have collected evidence against them. Similarly, if the police come to the conclusion that they cannot file charge-sheets against some of the accused because of certain opinion given to them, all that the Court can do is to discharge the accused and this cannot be said to be discrimination.

(Para 9)

(B) Forward Contracts (Regulation) Act (1952), Section 22A — Power to search and seize books of accounts or other documents — Section does not debar police from exercising powers under Section 165, Criminal P. C. AIR 1968 All 338, Diss. from.

(Para 15)

(C) Criminal P. C. (1898), Section 165 — Powers under — Section 22A, Forward Contracts (Regulation) Act (1952), does not de-

bar police from exercising power. AIR 1968 All 338, Dissented from. (Para 15)

(D) Forward Contracts (Regulation) Act (1952), Section 2 (1) — 'Ready delivery contract' — Merely because the word 'delivery' is written in some of the entries with a date, the contracts cannot become ready delivery contracts. AIR 1968 SC 653, Rel. on. (Para 24)

(E) Forward Contracts (Regulation) Act (1952), Section 2 (e) — 'Forward Contract' — Court has to consider real nature of transactions and real intention of parties at the date of transactions from the contract as well as surrounding circumstances. AIR 1969 SC 9, Rel. on. (Para 25)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 9 (V 56) =
1968-2 SCR 565, Modi Co v.

Union of India 25

(1968) AIR 1968 SC 653 (V 55) =
1968 Cri LJ 661, State of Gujarat

v. Manilal Joitaram 24

(1968) AIR 1968 All 338 (V 55) =
1968 Cri LJ 1325, Bullion and

Agricultural Produce Exchange Pvt.

Ltd. v. Forward Markets Commis-

sion, Bombay 11

(1965) AIR 1965 SC 1 (V 52) =
1965 (1) Cri LJ 100, Nihlatnan Sircar

v. Lakshmi Narayan Ram Niwas 16, 19

(1964) AIR 1964 SC 1300 (V 51) =
1965-6 SCR 1001, Dharendra Nath

v. Sudhir Chandra 14

(1964) Cri Appl Nos. 753, 797, 798,
799, 800 and 801 of 1963, D/-

6-4-1964 (Bom) 10

(1963) AIR 1963 SC 822 (V 50) =
1963 (1) Cri LJ 809, Radha Kishan

v. State of Uttar Pradesh 13

(1962) AIR 1962 SC 63 (V 49) =
(1962) 2 SCR 694 = 1962 (1)

Cri LJ 106, Delhi Administration

v. Ramsing 16

(1962) AIR 1962 SC 1694 (V 49) =
1963-1 SCR 98, Collector of Mon-

ghyr v. Keshav Prasad 14

(1960) AIR 1960 SC 210 (V 47) =
1960 Cri LJ 286, State of Rajasthan

v. Rehman 13, 14

(1956) AIR 1956 SC 44 (V 43) =
(1955) 2 SCR 925 = 1956 Cri LJ

140, Matajog Dobey v. H. C. Bhari 7

(1955) AIR 1955 SC 191 (V 42) =
(1955) 1 SCR 1045 = 1955 Cri LJ

374, Budhan Choudhary v. State

of Bihar 7

(1907) ILR 31 Bom 438 = 6 Cri LJ
60, Emperor v. Kaitan Duming

Fernad 16, 19

Cri Rev Applns Nos 282 and 283 of 1969:
G A Thakkar with Ashok Desai I/b M/s

Malvi Ranchhoddas Ramesh Shroff and Co,

for Accused, P. P. Khambata with Raghav-

vendra A. Jahagirdar, Advocates, for Com-

plainant, Raghavendra A. Jahagirdar, Hono-

rary Asst to Govt Pleader, for State.

In Cri. Rev. Appl No 284 of 1969:

Ashok Desai I/b M/s Malvi Ranchhoddas Ramesh Shioff and Co., for Accused; P. P. Khambata with Raghavendra A. Jahagirdar, for Complainant; Raghavendra A. Jahagirdar, Honorary Asstt. to Govt. Pleader, for State. In Crl. Rev. Appls. Nos. 357 to 360 and 363 of 1969:

K. D. Shah, Advocate, for Accused; Raghavendra A. Jahagirdar, Honorary Asstt. to Govt. Pleader, for State.

ORDER: The above 8 applications are filed by the accused against whom 8 cases are pending in the Court of the Presidency Magistrate, 28th Court, Esplanade, Bombay. The petitioners pray in these revision applications that the order passed on March 22, 1969 rejecting the application filed by the accused in case No. 957/P of 1968 and the charge framed by the Presidency Magistrate on March 25, 1969 against the respective accused in 8 cases should be set aside and the petitioners should be discharged. As these petitions involve common points and relate to common facts, they can be disposed of by one judgment,

2. The particulars of the charges framed against the petitioners in the 8 cases may be summarised and stated as in a tabular form as follows:—

(For Tabular Form see next page)

When the charges were framed against the accused, the accused pleaded not guilty and the hearing of the cases has been stayed by this Court after admitting the above revision applications filed by the accused.

3. The material common facts relevant for the purpose of disposing of these revision applications are as follows:—

On January 9, 1963, the Government of India issued a notification prohibiting forward contracts for sale or purchase of silver. On April 2, 1968 upon a complaint filed by the complainant, the Enforcement Officer of the Forward Markets Commission constituted under the Forward Contracts (Regulation) Act, 1952, Sub-Inspector of Police, Crime Branch (Drugs Control), C. I. D. Bombay suspecting that certain firms of bullion traders of Zaveri Bazar were conducting illegal forward trading in silver in contravention of Section 17 of the Forward Contracts (Regulation) Act, 1952 read with the aforesaid notification, raided the premises belonging to 8 firms suspected to be contravening the Act. During the raid, 47 persons including the petitioners were arrested, several documents found on the premises or with the persons arrested were seized and the accused were released on bail by the police. Thereafter the documents seized were scrutinised by the officers of the Forward Markets Commission and one Pradhan designated as Research Officer sent reports to the police alleging that the documents scrutinised disclosed that the firms of the petitioners were entering into for-

ward contracts in contravention of Sec. 17 of the Forward Contracts (Regulation) Act, 1952. The rest of the persons arrested on the basis of the documents seized from them had merely settled their transactions entered into by them by payment of differences. On perusal of the reports submitted by the Research Officer Pradhan and all the papers and on recording the statement of Pradhan, the police filed 8 chargesheets against the petitioners on October 31, 1968. In the meanwhile, the police applied to the Court for extension of the period of bail of all the accused from time to time. After filing the aforesaid chargesheets, on November 15, 1968, an application was made on behalf of the police to discharge 38 of the 47 accused on the ground that there was no sufficient evidence to substantiate any charge against them. The learned Magistrate immediately discharged the said 38 persons.

4. On March 5, 1969, the accused in criminal case No. 958/P of 1968 who are also the accused in case No. 957/P of 1968 filed an application for discharging the accused firstly on the ground that neither the prosecution nor the Court could discriminate between the 38 persons who were already discharged and the present petitioners who were all arrested in connection with the same kind of offences at the same time and place, secondly on the ground that the search and the seizure of the documents in the case were made without proper authority of search warrants under Section 22A of the Forward Contracts (Regulation) Act, 1952 and hence all proceedings consequent upon that search were illegal, and thirdly on the ground that the allegations and charges made in the chargesheets were groundless. It was also prayed in the said applications that the questions raised by the accused were important questions of the validity of the prosecution in view of Part III of the Constitution of India and hence the case should be referred to the High Court under Section 432 of the Code of Criminal Procedure. The application was supported by Counsel appearing for all the accused in all the other cases and it was treated as an application common to all the petitioners by the learned Magistrate.

5. By his order passed on March 22, 1968 the learned Presidency Magistrate rejected the application filed by the accused and proceeded to frame charges in 8 cases. On March 25, 1969, he framed charges in the 8 cases against the respective accused, the particulars of which are briefly stated above, for contravening the provisions of the Forward Contracts (Regulation) Act, 1952.

6. The very contentions which were urged before the learned Presidency Magistrate are urged in the above revision applications challenging the said order dated March 22, 1968 and praying for quashing the charges framed against the accused,

No of Criminal Revision Application	No. of the case in the Court of Presidency Magistrate.	Names of the accused (Petitioners)	Charges under what sections of the Forward Contracts (Regulation) Act, 1952	Brief Particulars of the Charge
1. 282 of 1969	957/P of 1968	1. Messrs. Motilal Vrijbhukhandas 2. Shantilal Narayandas Sonawala. 3. Pushpavati Hariyantal Sonawala.	1. 21 (i), 21 (a) and 22. 2. 21 (1), 21 (e), 22	1. Between January 1968 and April, 2, 1968 owned or kept a place at 155, Shaikh Memon Street, Bombay 2, other than place of a recognised association and used for transacting forward contract in silver in contravention of section 17. 2. Accused Nos. 1, 2 and 3 managed or controlled the said place.
2. 283 of 1969	958/P of 1968	do.	1. 20(e), 22 2. 20(e), 22	1. For entering into a prohibited forward contract in silver on Feb. 14, 1968 with Mahendra Champaklal for the purchase of 2 bars of silver at the rate of Rs. 522.25 per kg. 2. For entering into a prohibited forward contract in silver on Jan. 15, 1968 with Ishwarlal Kantilal for the purchase of 2 bars of silver at the rate of Rs 539.44 per kg.
3. 284 of 1969	956/P of 1968	1. Shantilal Narayandas Sonawala 2. Jayanti Kapurchand Shah. 3. Pranjivandas Shambharlal Bhatt 4. Natverlal Mathuradas Shah	21 (i) and 21 (f)	For all of them joining together at 155, Shaikh Memon Street Bombay, 2 owned by Messrs Motilal Vrijbhukhandas for entering into forward contracts in silver.
4. 357 of 1969	960/P of 1968	1. M/s Rasiklal Mansukhlal & Co 2. Deoraj Kathodbbhai. 3 Chandrakant Deorajbhai. 4. Shyamsunder Shivprasad Kabra.	1. 21 (i), 21 (a), 22 2. 21 (i), 21 (e) and 22	1. For using 95, Shaikh Memon Street, for transacting forward contracts in silver between January 1968 and April 2, 1968. 2. Partners accused Nos. 2, 3 and 4 and their firm accused No. 1 controlled and kept the above place.

No. of Criminal Revision Application.	No of the case in the Court of Presidency Magistrate	Names of the accuse (Petitioners)	Charges under what sections of the Forward Contracts (Regulation) Act, 1952	Brief Particulars of the Charge.
5. 358 of 1969	962/P of 1968	-do-	1. 20(c), 22 2. -do-	1. For entering into <i>Teji</i> option with Moti Vrijbhukhan for 25 units of silver between March 24, 1968 and April 1, 1968. 2. For entering into <i>Mandi</i> option with Divan during the same period.
6. 359 of 1969	963/P of 1968	1. M/s Jamnadas Talkchand. 2. Thakordas Gordhandas. 3. Bhagwandas Gordhandas. 4. Vallabhadas Gordhandas.	1. 20(e), 22 read with 19 2. 20(e), 22 read with 19 3. 20(e), 22 read with 19	1. For entering into 'Jota' option with V. Navnit for 2 units of silver on February 29, 1968. 2. For entering into 'Jota' option with Sunder Tulsī for 2 units of silver on February 19, 1968. 3. For entering into 'Jota' option with Keshav Chunilal for 2 units on February 19, 1968.
7. 360 of 1969	961/P of 1968	1. M/s. Rasiklal Mansukhlal & Co. 2. M/s. Deoraj Kathedbhāi. 3. Chandrakant Deorajbhāi. 4. Shyamsunder Shivprasad Kabra.	S. 20(e) and 22	For entering into forward contract with Jethubai Pattodia on March 4, 1968.
8. 363 of 1969	959/P of 1968	1. Devraj Kathedbhāi. 2. Gordhandas Khatedbhāi. 3. Ramnarayan Ramdhan Karamji. 4. Badrinarayan Heeralal.	S. 21(i) and S. 21(f)	For joining together on April 21, 1968 at 95, Shaikh Memon Street, an unauthorised place, for transacting forward contracts.

7. The first contention raised is that the prosecution of the petitioners in the aforesaid 8 cases after the discharge of the 38 persons referred to above is hit by the vice of discrimination prohibited under Art. 14 of the Constitution. Apart from any authorities, it is clear that Article 14 of the Constitution of India requires the State not to deny any person equality before the laws or equal protection of laws in the territory

of India. It is difficult to appreciate how the petitioners who are being prosecuted under the Forward Contracts (Regulation) Act can contend that they are denied equality before the law or equal protection of the law merely because some other persons are not prosecuted. Reliance was placed, however, on the decision of the Supreme Court in *Budhan Choudhary v. State of Bihar*, (1955) 1 SCR 1045 = (AIR 1955

SC 191) where the scope of the protection afforded by Article 14 was discussed in the context of an attack on Section 30 of the Criminal Procedure Code which empowered the State Government in certain areas to invest any District Magistrate, Presidency Magistrate or Magistrate of the first class with power to try as a Magistrate all offences not punishable with death and it was held by the Supreme Court that Section 30 of the Code of Criminal Procedure did not infringe the fundamental right guaranteed by Article 14 of the Constitution after laying down the test of permissible classification for purposes of legislation. Their Lordships did observe in that case at p. 1049 (of SCR) = (at p. 193 of AIR),

"It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

Counsel for the accused also relied on *Matajog Dobey v. H. C. Bhari*, (1955) 2 SCR 925 = (AIR 1956 SC 44) in which the question of the validity of Section 197 was challenged on the basis of discrimination and once again the Supreme Court considered the scope of the protection afforded by Article 14 and held that Section 197 of the Criminal Procedure Code could not be challenged on the ground that it violated Article 14 of the Constitution of India and it was held further that Article 14 did not render Section 197 of the Code of Criminal Procedure ultra vires as the discrimination on the part of the Government to grant sanction against one public servant and not against another was based on rational classification

8. In the instant cases, in my opinion, no question of discrimination arises because the 38 accused who were discharged cannot be said to be similarly placed or situated as the petitioners. The Police had not filed any charge-sheet against those 38 persons. In their application for discharge of those 38 persons the police stated that there was no evidence on the basis of which they could be prosecuted. That is not the case so far as the petitioners were concerned. The police have not only filed the charge-sheets and supplied the statements and documents on which they relied but contended that the present petitioners ought to be prosecuted. It is argued, that in their application for discharging the 38 accused it was stated as follows:—

"It is ascertained that some of the accused mentioned in the margin have entered into weekly delivery contracts in silver and settled them by payment of differences instead of actual delivery. It was contended that this type of contract amounted to forward contract. On the other hand it was opined by the Attorney General of India that a ready delivery contract cannot be said to be forward contract only because it is not settled by actual delivery. On this

point the Forward Markets Commission followed the opinion of the Attorney General of India and advised the police to act accordingly. The papers were then sent to the Chief Police Prosecutor for opinion and we have been advised to hold that the charge under Section 20 (e) cannot be substantiated under these circumstances."

The case of the accused is that the papers relied on by the prosecution against the petitioners revealed only weekly delivery contracts and settlement by payment of differences instead of actual delivery. The accused submitted that the conditions and terms on which those contracts were entered into were identical with the conditions and terms on which the 38 discharged persons entered into contracts and hence the accused were similarly placed with the other 38 persons and the police could not discriminate against the petitioners by prosecuting them and discharging the 38 persons who had entered into similar contracts.

9. There is no merit in this contention. It is not correct to state that the contracts which the petitioners entered into were weekly delivery contracts settled by payment of differences. The allegations of the police in the chargesheet are that the contracts which the accused entered into were forward contracts and not ready delivery contracts. The police have a discretion in collecting evidence against the accused and in filing a chargesheet. It is now settled that a court cannot compel the police to file a chargesheet if the police come and tell the Court that they are unable to prosecute some persons because they have no evidence. It cannot be said that they have discriminated against the other accused against whom they have collected evidence. Even assuming that the police were wrong and the 38 persons against whom the police did not collect evidence had also committed offences, it cannot be suggested that the police have discriminated against the present accused because they have collected evidence against them. Similarly, if the police come to the conclusion that they cannot file chargesheets against some of the accused because of certain opinion given to them, all that the Court could do was to discharge the accused and this cannot be said to be discrimination. Merely because the police stated their inability to prosecute the said 38 persons, they cannot be prevented from prosecuting the present accused on the basis of the evidence which they have collected. The learned Presidency Magistrate was, therefore, right in overruling the contention raised by the petitioners and in holding that no question of interpretation of Article 14 arose in this case.

10. The second contention raised on behalf of the petitioners is that the prosecution of the petitioners is based on evidence collected during the raid carried out on April 2, 1968 and this raid and search of

the papers belonging to the accused was illegal because the police had not applied for a search warrant under Section 22A of the Forward Contracts (Regulation) Act, 1952. The learned Presidency Magistrate overruled this contention following an unreported judgment dated April 3/6, 1964 by Mr. Justice Chitale and Mr. Justice Palekar in Criminal Appeals Nos. 753, 797, 798, 799, 800 and 801 of 1963 (Bom) in which the conviction of the accused under Sections 20 (e) (i) and 21 (f) of the Forward Contracts (Regulation) Act, 1952 was challenged inter alia on the ground that the search made by the police without a warrant issued by the Presidency Magistrate was illegal. On this question Mr. Justice Palekar observed:—

"It was, however, contended on their behalf that the search itself was illegal, because there was no search warrant issued by the Presidency Magistrate as required by Section 22A of the Act. It is true that under Section 22A of the Act, any Presidency Magistrate or a Magistrate of the first class is empowered by warrant to authorize any police officer not below the rank of Sub-Inspector to enter upon and search any place and seize books of accounts and other documents relating to options in goods. It is also not disputed that the officers who raided the place did not have any warrant issued by the Presidency Magistrate. It is, however, to be noted that the particular offences with which these respondents have been charged were cognizable offences under Section 23 of the Act, and, therefore, when a complaint was filed before the investigating officer with regard to the commission of the offence, the investigating officer was entitled under Section 165 of the Code of Criminal Procedure to search any place for anything which the investigating officer had reasonable ground for believing that it was necessary for the purpose of investigation. We do not, therefore, think that the search conducted by the police officers in this case after information was given of a cognizable offence was a search unauthorised by law." With respect, I am bound by this decision. Apart from that, I am fully in agreement with the view expressed by Mr. Justice Palekar. Section 5 (2) of the Code of Criminal Procedure lays down that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the provisions, of the Code of Criminal Procedure, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 23 of the Forward Contracts (Regulation) Act, 1952 is as under:—

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, the following offences shall be deemed to be

cognizable within the meaning of that Code, namely:—

(a) an offence falling under sub-clause (ii) of Clause (a) of Section 20 in so far as it relates to the failure to comply with any requisition made under sub-section (3) of Section 8;

(b) an offence falling under Clause (d) of Section 20;

(c) an offence falling under Clause (e) of Section 20 other than a contravention of the provisions of sub-section (3A) or sub-section (4) of Section 15;

(d) an offence falling under Section 21. The offences charged against the petitioners in the present cases are, under Section 23, cognizable. There is no provision in the Forward Contracts (Regulation) Act regulating the manner or place of investigating of the offences by the police.

11. It is, however, contended by Mr. Thakkar, the learned Counsel appearing for the petitioners in Criminal Revision Application No. 282 of 1969, by Mr. Desai, the learned Counsel for the petitioners in Criminal Revision Application No. 283 of 1969, and by Mr. Shah, the learned Counsel appearing for the petitioners in the other cases, that the police officer cannot exercise his powers under Sections 157 and 165 of the Criminal Procedure Code and search the place of offence without the authority of a warrant issued under Section 22A. Now Section 22A is as under:—

"(1) Any Presidency Magistrate or a Magistrate of the first class may, by warrant, authorise any police officer not below the rank of sub-inspector to enter upon and search any place where books of account or other documents relating to forward contract or options in goods entered into in contravention of the provisions of this Act, may be or may be reasonably suspected to be and such police officer may seize any such book or document, if in his opinion, it relates to any such forward contract of option in goods.

(2) The provisions of the Code of Criminal Procedure, 1898, shall, so far as may be, apply to any search or seizure made under sub-section (1) as they apply to any search or seizure made under the authority of a warrant issued under Section 98 of the said Code."

The contention raised on behalf of the defence is sought to be supported by a decision of a single Judge of the Allahabad High Court in *The Bullion and Agricultural Produce Exchange Pvt. Ltd v. Forward Markets Commission, Bombay*, AIR 1968 All 338 where the learned Judge dissented from the aforesaid decision of Mr. Justice Chitale and Mr. Justice Palekar on the ground that the matter was not discussed in detail and he was unable to endorse the view point expressed by this Court. With utmost respect, the learned Judge was not right when he said that the matter was not

discussed.' The passage from the judgment quoted above shows that this Court has discussed the contention and arrived at its conclusion after taking into consideration the provisions of the Criminal Procedure Code and the Forward Contracts (Regulation) Act.

12. Apart from that, in my opinion, the view expressed in the Allahabad decision is not only contrary to the plain terms of Section 5 (2) of the Code of Criminal Procedure but is inconsistent with the aim and object of the Forward Contracts (Regulation) Act in making certain offences under that Act cognizable. The enactment of Section 22A in that Act was clearly intended to enable a Magistrate to issue a search warrant authorising any police officer not below the rank of a Sub-Inspector to enter upon and search any place where books of account and other documents relating to forward contracts or options in goods entered into in contravention of the provisions of that Act may be or may reasonably be suspected to be. But for this section, a Magistrate could issue a search warrant only under the provisions of Section 96 or 98 of the Criminal Procedure Code which perhaps, would not cover a case of a place where books of account or other documents relating to forward contracts or options in goods might be or might reasonably be suspected to be. Section 22A must be harmonised with Section 23 which makes the offences mentioned therein cognizable, which means that not only can the police arrest the accused without warrant but investigate the offences under Chapter XIV of the Criminal Procedure Code. In the absence of any specific provisions in the Forward Contracts (Regulation) Act preventing the police from exercising their powers of search under Section 157 or 165 of the Criminal Procedure Code and in the absence of any other provision regulating the manner of investigation by the police, contained in the Act, I find it impossible to agree with the view expressed in the Allahabad case.

13. Moreover, Mr. Justice Satish Chandra who decided that case, with utmost respect, appears to have assumed that Section 22A is a specific provision relating to the search of places by the police, which it is not. As stated above, Section 22A is only an enabling provision enabling the police to arm themselves with a warrant from the Magistrate if the police consider it necessary to avoid allegations being made against them. It confers a power on the Magistrate to issue a warrant which he could not have perhaps issued under the provisions of the Criminal Procedure Code. The learned Judge has referred to a decision of the Supreme Court in *State of Rajasthan v. Rehman*, AIR 1960 SC 210 in which the accused was acquitted because he was prosecuted after a search which was in contravention of the provisions of Section 165 of the Criminal Procedure Code and that ac-

quittal was confirmed by the Supreme Court. A contention was raised before the Supreme Court that the breach of the provisions of Section 165 was merely an irregularity and not an illegality. But that contention was not allowed to be raised because it was not raised in the two Courts below. (See para. 10 at p. 213). In *Radha Kishan v. State of Uttar Pradesh*, AIR 1963 SC 822 a larger Bench of the Supreme Court held that a search in contravention of the provisions of Section 103 and 165 of the Code of Criminal Procedure could be resisted by the person whose premises were sought to be searched and because of the illegality of the search, the Court may examine carefully the evidence regarding the seizure, but beyond these two consequences, no further consequences ensued.

14. It is difficult to appreciate how the decision of the Supreme Court in AIR 1960 SC 210 could be relied on for the conclusion of the learned Judge that Section 165 of the Criminal Procedure Code was not available for an investigation by the police of an offence under the Forward Contracts (Regulation) Act, 1952. The learned Judge has further referred to *Collector of Monghyr v. Keshav Prasad*, AIR 1962 SC 1694 and *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300 which lay down the principles of interpretation of statutes regarding the question as to whether certain provisions are mandatory or directory in the context of the words like 'shall' or 'may' and has held that although the word 'may' is used in Section 22A of the Forward Contracts (Regulation) Act, 1952, it should be construed as a mandatory provision. With the greatest respect, I must say that I cannot follow how this conclusion can be arrived on the basis of the two decisions of the Supreme Court relied upon by the learned Judge.

15. In my view, therefore, Section 22A of the Forward Contracts (Regulation) Act does not debar the police from exercising the powers under Section 165 of the Criminal Procedure Code.

16. Mr. Thakkar further argued that the decisions of the Supreme Court in *Niratan Sircar v. Lakshmi Narayan Ram Niwas*, AIR 1965 SC 1, *Delhi Administration v. Ram Singh*, (1962) 2 SCR 694 = (AIR 1962 SC 63) and decision of this Court in *Emperor v. Kaitani Duming Fernad*, (1907) ILR 31 Bom 438 = (6 Cri LJ 60) supported his contention that Section 22A excluded the operation of Section 165 of the Criminal Procedure Code.

17. Now *Niratan's* case, AIR 1965 SC 1 was under the Foreign Exchange Regulation Act under which the Director of Enforcement was entitled to retain articles seized by him under Section 19A and it was held that the Magistrate cannot exercise his powers under the Criminal Procedure Code in connection with properties seized under

sub-section (3) of Section 19 of the Act. There is a clear and specific provision under Section 19A with regard to the manner of dealing with articles seized by the Director of Enforcement, and in view of Sec. 5 (2), of the Criminal Procedure Code, it was patent that this specific provision excluded the powers of the Magistrate to order disposal of the articles under the Criminal Procedure Code.

18. In the Delhi Administration's case, 1962-2 SCR 694 = (AIR 1962 SC 63) the Court was concerned with the investigation by the special police officers under the Suppression of Immoral Traffic in Women and Girls Act, 1956, which contains special mandatory provisions regarding the investigation of the offences under that Act and hence it was held that the ordinary police officer could not exercise the powers under the Criminal Procedure Code and investigate the offences under that Act.

19. In (1907) ILR 31 Bom 438 = (6 Cri LJ 60) the question was whether the presumption under the Bombay Prevention of Gambling Act was properly raised and this depended on the question as to whether the search was made in accordance with the provisions of that Act which contained a special provision with regard to the search of places where gambling was going on or where gambling was suspected to be going on.

20. All these cases are, in my opinion, easily distinguishable because in these cases there were special provisions under the respective special enactments which would override the general provisions of the Criminal Procedure Code. That is not the case under the Forward Contracts (Regulation) Act, 1952 which lays down that certain offences are cognisable which necessarily implies that the police can investigate those offences under Chapter XIV of the Code of Criminal Procedure; and there is no provision made in the Act regulating the manner of investigation by the police. Hence the contention of the petitioners that the prosecution of the petitioners is illegal because no warrant was issued under Section 22A of the Act must be rejected.

21. The third contention strenuously urged by the Counsel for the petitioners is that under Section 251A (2) of the Criminal Procedure Code, it was the duty of the Magistrate to discharge the petitioners as the charges levelled against them in the respective chargesheets were groundless. It was contended that under Clause (3) of Section 251A a charge could be framed by the Magistrate if on a consideration of all the documents referred to in Section 173 and such further examination being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate was of the opinion that there was a ground for presuming that the accused had

committed offences under the Forward Contracts (Regulation) Act, 1952. But in all these cases, the only documents that were filed along with the chargesheet under Section 173 were the statement of the Research Officer and reports submitted by him with annexures and these reports and annexures of statements of accounts according to the Counsel for the accused, did not afford any ground for prosecuting the accused. Mr. Thakkar drew my attention to these statements of accounts and contended that there was nothing therein from which the Court could infer or presume that the accused had entered into forward contracts in contravention of the Act. He submitted that the statement of the complainant at whose instance the search was carried out was not supplied to the accused and there was no material other than the report of the Research Officer relied upon by the police in filing the chargesheet. He further contended that even the Research Officer in his report had stated that the entries in the accounts which were seized showed the delivery dates in respect of the contracts and in view of that, it could not be said that the contracts that were recorded in the statements of accounts were a forward contracts. With reference to the inference made by the Research Officer that merely because the delivery of silver was not made or payment of the price was not made within 11 days and the transactions were carried forward by cross transactions, it does not cease to become a forward contract, he argued that it could not be necessarily argued, on the basis of these facts that the contracts were forward contracts. Mr. Desai further contended that the inference of the Research Officer that the transactions were carried forward was itself not correct as they appeared to be independent transactions. It was submitted that in any event, the Court would not be justified in framing a charge merely relying on the opinion of a Research Officer which, according to them, would not be relevant or admissible under Section 45 of the Indian Evidence Act or under any other provision of law.

22. There is no substance in any of these contentions. It is not possible at this stage to decide finally whether the contracts which are recorded in the statements of accounts annexed to the reports made by the Research Officer are forward contracts or ready delivery contracts as defined by Forward Contracts (Regulation) Act, 1952. It is true that the charges appear to have been framed relying on the statement of the Research Officer and the reports as well as the statements of accounts. Now "forward contract" is defined in Section 2 (c) of the Act to mean a contract for delivery of goods at a future date and which is not a ready delivery contract. "Ready delivery contract" is defined in Section 2 (i) of the Act as follows:—

"Ready delivery contract" means a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract and subject to such conditions as the Central Government may, by notification in the Official Gazette, specify in respect of any goods, the period under such contract not being capable of extension by the mutual consent of the parties thereto or otherwise."

According to the prosecution, the statements of accounts annexed to the report of the Research Officer do not show that any delivery of the silver or payment of the price was to be made within 11 days after the date of the contract because the course of transactions revealed by these statements of accounts shows that the price of the silver bars or units sold and bought were never credited or debited. What were credited and debited were merely the quantity of silver and the price or the rate; and further at no time were the contracts settled by payment of the price or the delivery of the goods. The petitioners only settled the differences to be paid or received and hence although in some of the statements of accounts delivery dates are indicated, the contracts were not ready delivery contracts as they neither provided for the delivery of goods nor the payment of price therefor either immediately or within a period not exceeding 11 days after the date of the contract.

23. Mr. Thakkar, however, on the other hand, repelled these contentions on the ground that merely because delivery was not made or price was not paid or only differences were paid and the contracts were carried forward, it could not be said that they were not ready delivery contracts as defined under the Act. He submitted that what the Court has to consider is whether the contracts provided for the delivery of goods and the payment of price therefor either immediately or within such period not exceeding 11 days after the date of the contract and the fact that the quantity is mentioned along with the price and it is credited or debited was enough to show that the payment of the price was contemplated and the fact that the delivery date was admittedly mentioned in these statements of accounts further showed that delivery of goods was also contemplated. Mr. Desai supplemented this argument by further urging that merely because subsequent to the date of the contract the parties have entered into new contracts and settled the rights and liabilities under the old contracts by payment of differences would not justify the Court in imputing an intention to the parties to enter into a forward contract on the date of the contract.

24. All these contentions deserve to be considered carefully when the prosecution

has led evidence and the defence statements or evidence, if any, are recorded in support of their contentions. At present I am only concerned with the question as to whether the learned Presidency Magistrate was justified in framing the charges against the accused on the basis of the documents, statements and papers before him filed with the chargesheets and I have no doubt that he was fully justified in framing the charges and enquiring further into the matter giving an opportunity to both the parties to lead evidence in accordance with law. Although there are 8 cases, the charges framed are substantially based on the entries in the Sauda books and other books seized from the respective accused at the premises and the presence of the accused at the two premises situated at 155 Memon Street and 95 Shaikh Memon Street. I have carefully considered all the entries and I find that the learned Magistrate was right in holding that there was ground for presuming that the accused had committed offences charged against them. At present, apart from the contention of the accused that the contracts were ready delivery contracts, there is nothing on the record which would justify the Court in holding that the contracts were ready delivery contracts, because none of these entries shows prima facie, that delivery and payment were contemplated within 11 days from the date of the contract. Merely because the word 'delivery' is written in some of the entries with a date, the contracts cannot become ready delivery contracts. In *State of Gujarat v. Mamlal Jaitaram and Co.*, AIR 1968 SC 653 the Supreme Court considered certain transactions on paper in the context of the provisions of Section 18 of the Forward Contracts (Regulation) Act and Section 20 (1) and Mr. Justice Hidayatullah, as he then was observed:

"It is also clear that the contracts, although they appeared to be non-transferable specific delivery contracts were not intended to be completed by delivery immediately or within a period of 11 days from the date of the contract. In fact week after week contracts were cancelled by cross-transactions and there was no delivery. Instead of payment of price, losses resulting from the cross-transactions were deposited by the operators in loss with the Association. Further, on the due date also, there was no delivery but adjustment of all contracts of sales against all contracts of purchase between the same parties and delivery was of the outstanding balance. Even this delivery was often avoided by entering into fresh contracts at the rate prevailing on the due date, as part of the transactions in the next period. There is evidence also to establish this. In other words the transactions on paper did seem to comply with the regulations but in point of fact they did not and the Association arranged for settlement of the entire transactions (barring an insignificant portion, if at all) without delivery."

In view of these facts and circumstances, the Supreme Court set aside an order of acquittal passed by the Gujarat High Court and convicted the accused in that case under Clauses (b) and (c) of Section 21.

25. With respect, these principles of finding out the real nature of the transactions have to be applied to the facts of the present case and the learned Presidency Magistrate will have to find out what is the true nature of the transactions in the statements of accounts which are annexed to the reports of the Research Officer filed along with the chargesheet. It is open to the accused to point out and, if necessary, to lead evidence to show that whatever has been recorded by them relate only to ready delivery contracts. It is also open to the prosecution to prove in accordance with law that all the entries made were relating to the transactions prohibited under the Forward Contracts (Regulation) Act. The Court will have to consider the real nature of the transactions and the real intention of the parties at the date of the transactions from the contracts as well as all the surrounding circumstances. See *Modi Co. v. Union of India*, AIR 1969 SC 9.

26. For these reasons, I find that the orders passed by the learned Presidency Magistrate are proper and in accordance with the law and dismiss all the revision applications. The stay granted by this Court is vacated and the rule is discharged. Record and proceedings to be sent down immediately.

Order accordingly.

1970 CRI. L. J. 1225 (Vol. 76, C. N. 306) =
AIR 1970 CALCUTTA 384 (V 57 C 69)
D. BASU, J.

Sunil Kumar Ghosh, Petitioner v State of West Bengal and others, Opposite Parties.
 Civil Rule No. 1305 (W) of 1965, D/- 29-5-1969.

(A) Constitution of India, Article 311 (2) and Proviso (a) — Reasonable opportunity for delinquent — Words “criminal charge” in Proviso (a) — Meaning — Delinquent convicted under Section 29. Police Act and dismissed — Article 311 (2) Proviso (a) applies — Hence Article 311 (2) is inapplicable.

The offence under Section 29, Police Act is created by a special statute. It is a criminal offence and a charge thereof is a “criminal charge” within the meaning of Art. 311 (2) Proviso (a). Article 311 (2) therefore does not apply to his dismissal based on that conviction. The delinquent in such a case cannot question an inquiry held under Article 311 (2) on the ground that his service records were referred to without notice to him. AIR 1966 Andh Pra 72 and AIR

1946 Mad 375 and AIR 1957 Punj 97 and AIR 1959 Assam 134 and Salmond on Torts 10th Edn. Pp. 2 and 7, Torts by Winfield, 7th Edn Pp. 10 and 11, Outline of Criminal Law by Kenny, 16th Edn. P. 539 and Criminal Law by Wilshire, 17th Edn. Pp. 1 and 2, Foll. (Paras 18, 19, 22, and 26)

(B) Constitution of India, Article 311 (2) and Proviso (a) — Exemption from holding inquiry and giving opportunity under Article 311 (2) — Exemption is for benefit of administration and is conducive to public interests — Government not estopped from claiming such exemption even after inquiry — (Evidence Act (1872), Section 115). AIR 1961 SC 619, Dist. (Para 24)

(C) Constitution of India, Article 311 (2) — Reasonable opportunity to delinquent — Police officer absenting from duty, dismissed — No suspension order passed — Notice for treating absence as leave without pay not given — Extraordinary leave not sought — Earned leave due to delinquent — Period of absence till dismissal date cannot be treated as extraordinary leave without pay — Delinquent entitled to full salary as if on duty. AIR 1968 SC 240, Applied. (Paras 27, 28 and 29)

Cases Referred:	Chronological	Paras
(1968) AIR 1968 SC 240 (V 55) =		
1968-1 SCR 355, Gopalkrishna v. State of M. P.		28
(1966) AIR 1966 Andh Pra 72 (V 53) =		
1966 Cri LJ 251, Re Nagabhushan		21
(1961) AIR 1961 SC 619 (V 48) =		
1961-3 SCR 386, Akshaibar Lal v. Vice Chancellor		24
(1959) AIR 1959 Assam 134 (V 46), Jagadmdsa v. I. G. of Assam Rifles		21
(1957) AIR 1957 Punj 97 (V 44) =		
1956-30 ITR 423, Durga Singh v. State of Punjab		21
(1946) AIR 1946 Mad 375 (V 33) =		
1946-1 Mad LJ 249, Venkatarama v. Province of Madras		21
Nani Coomar Chakraborty, Chittotosh Mukherjee and Jamini Kumar Banerjee, for Petitioner; B C. Dutta and Murari Mohan Dutta, for Opposite Parties.		

ORDER: This Rule raises a short but nice question of law.

2. I. That question, apart from others raised in the Petition (which will be dealt with hereafter) is—

2a. Whether ‘conviction on a criminal charge’, in Proviso (a) to Article 311 (2) of the Constitution includes conviction of a statutory offence.

3. The Petitioner, a Sub-Inspector of Police, was, at the material time, serving as a District Enforcement Officer of 24 Parganas. By an order of December 19, 1959, passed by the Supdt. of Police, he was transferred to Nadia with effect from January 2, 1960 and directed to undergo training in Fingerprint (Annexure A to the Petition) from there. The Petitioner made representations

during the pendency of which another order was issued by the Addl. Supdt. of Police (Enforcement) of 24-Parganas on March 22, 1960, by which he was asked not to discharge any duties as a Police Officer in the Dt. of 24-Parganas as he had been transferred away from the district with effect from January 8, 1960. As he did not still comply with the said order of transfer, a complaint was lodged against him, under orders of the Superintendent of Police, 24-Parganas for alleged offence under Section 29 of the Police Act, for violation of the order of transfer. This ended in the conviction of the Petitioner by the Magistrate, 1st Class, Alipore on November 25, 1961, and the Petitioner was sentenced to pay a fine of Rs 100 or, in default to undergo simple imprisonment for one week. His appeal against this sentence was dismissed (Annexure F) and so was his application for revision to this Court, where it has been held that he was clearly guilty of violating the order of transfer to Nadia (Annexure H).

4. Thereupon on December 28, 1963, he was served with the charge-sheet at Annexure I. The Petitioner pleaded not guilty to the charge. There was a proceeding held upon the charge by the Superintendent of Police, 24-Parganas and on May 30, 1964, he recommended (Annexure N/1) that—

(a) The Petitioner be dismissed from service,

(b) His period of absence from duty from January 8, 1960 till the date of dismissal be treated as extraordinary leave without pay.

5. The Deputy Inspector-General of Police approved of the order proposed (Annexure O) and, in pursuance thereof, the order at Annexure P, dated July 2, 1964 was passed, dismissing the Petitioner with effect from that date on which a copy of the Deputy Inspector-General's order had also been served upon him. Annexure Q is an order of the Superintendent, asking for a return of the uniforms and appointment certificate in view of the foregoing order of dismissal.

6. The Petitioner challenges the orders at N/1 to Q on the ground, inter alia, that the requirements of Article 311 (2) of the Constitution have been violated in making the aforesaid orders inasmuch as the Petitioner was denied the opportunity of cross-examining witnesses at the inquiry held on the charge and his service records were taken into consideration to award the extreme penalty of dismissal, without giving him notice that they would be considered at the inquiry.

7. But, even assuming that the complaint of the Petitioner was true on facts, he cannot get any relief on the present ground if Proviso (a) is attracted, to exclude the operation of Clause (2) of Article 311 altogether. That clause provides for an inquiry on the charges at which the delinquent shall

have an opportunity of being heard and thereafter to make a representation against the penalty proposed, where that penalty is dismissal, removal or reduction in rank of a person holding a civil post under the Government. There is no dispute as to a Police Officer holding a civil post under the State Government, so as to be entitled to the protection of Clause (2) of Article 311.

8. But the application of the entire Clause (2) of Article 311 is excluded by Proviso (a) which says—

“Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge”.

9. The Petitioner has been convicted of the offence under Section 29 of the Police Act for violating the order of transfer to Nadia. But it is contended on behalf of the Petitioner by Mr. Chakravarty, that the expression ‘criminal charge’ refers to charge of an offence under the general law of crimes and not to an offence which is commonly known as a ‘statutory offence’.

9a. Section 29 of the Police Act, 1861 provides—

“Every police-officer who shall be guilty of any violation of duty or wilful breach or neglect of any lawful order made by competent authority ... shall be liable, on conviction before a Magistrate to a penalty not exceeding three months’ pay, or to imprisonment, with or without hard labour for a period exceeding three months, or to both”.

10. Obviously, this is not a charge of an offence included in the Indian Penal Code, which constitutes the general law of crimes in this country, but an offence created by a special statute, namely, the Police Act, to be met with by a statutory penalty. The question is whether this constitutes a ‘criminal charge’, which expression is not defined in the Constitution or in the General Clauses Act.

11. The question has, therefore, to be answered with reference to general principles.

12. The Dictionary meaning of the word ‘charge’ in the legal sense is ‘accusation’. ‘Criminal charge’, therefore, would mean accusation of a ‘crime’. The Dictionary meaning of the word ‘crime’, again, is an ‘act punishable by law’ (Shorter Oxford Dictionary). To punish means to ‘inflict penalty on an offender’. If these Dictionary meanings prevail, any offence which is created by any statute and is punishable by any penalty imposed thereby would be included within the concept of a ‘criminal charge’.

13. The most common way adopted by leading treatises is to define crimes by distinguishing them from civil wrongs. In Sal-

mond on Torts (10th Ed., p. 7), the distinction is drawn as follows:

"The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law. A civil wrong is one which gives rise to civil proceedings—proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant: for example, an action for the recovery of a debt... Criminal proceedings, on the other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. He who proceeds civilly is a claimant, demanding the enforcement of some right vested in himself; he who proceeds criminally is an accuser, demanding nothing for himself but merely the punishment of the defendant for a wrong committed by him".

14. The element of punishment as the differentia of a crime is also emphasised by Winfield (Torts, 7th Ed., 10-11) and Kenny [(Outline of Criminal Law (16th Ed., p. 539)]. In some cases, of course, criminal law provides for payment of monetary compensation by the convicted person to the person injured; but even in those cases, such compensation is awarded in addition to some punishment.

15. Quoting observations in decisions, Wilshire (Criminal Law, 17th Ed., pp. 1-2) explains the essential characteristics of a crime as follows:

"The essential characteristic of a criminal offence is that it entails a liability to punish—the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common feature that they will be found to possess is that they are prohibited by the State and that those who commit them are punished".

16. The old distinction between mala prohibita and mala in se has broken down because many acts which have been made punishable as an offence by statutes do not involve any moral turpitude:

"In particular, nothing in the moral character of an act or omission can distinguish it from a civil wrong or make it a criminal offence. There are, for example, many breaches of statutory regulations and by-laws which, because they are punishable in criminal proceedings, must be classed as criminal offences though they do not involve the slightest moral blame, as, for example, 'the failure to have a proper light on a bicycle.' " (Salmond, *ibid*)

17. But a statutory offence should not be a criminal offence "unless the punishment is inflicted as a result of criminal proceedings" (p. 2, *ibid*), i.e., in a proceeding before a criminal court

18. Judged by the foregoing tests, the offence under Section 29 of the Police Act

is a criminal offence and the charge of such an offence is a criminal charge because—

(a) By the statute, violation of duty or wilful breach of any order made by a competent authority has been prohibited and made punishable by fine or imprisonment or both

(b) The offence is triable before a Magistrate, i.e., a criminal court.

(c) The proceeding is a criminal proceeding because the object of the proceeding is not the enforcement of some right belonging to any complainant or person injured by such act but the punishment of the delinquent Police Officer, and it started with a prosecution (Annexure D/1).

19. Consequently, the instant case would fall under the purview of Proviso (a) to Article 311 (2) of the Constitution. The conclusion arrived at by me is also supported by the interpretation so far given by the High Courts to that clause:

20-21. It has been held that—

Conviction on a criminal charge in this clause includes conviction under any law which provides for punishment for an offence, whether by fine or imprisonment [In *re Nagabhushan*, AIR 1966 Andh Pra 72], and that no distinction is made by this clause between crimes involving moral turpitude and other crimes [Venkatarama v. Province of Madras, AIR 1946 Mad 375; Durga Singh v. State of Punjab, AIR 1957 Punj 97; Jagadindra v. I. G., AIR 1959 Assam 134] AIR 1957 Punj 97 *ibid*, was a case of conviction of the offences specified in Section 34 of the Police Act, and is thus directly to the point.

22. I have no doubt, therefore, that Clause (2) of Article 311 was not attracted to the present case and that, accordingly, no opportunity to be heard or inquiry was to be held before dismissing the Petitioner on the ground that he had been convicted under Section 29 of the Police Act.

23. II In view of the foregoing finding, it is not necessary to go into the question whether an opportunity was actually given to the Petitioner. Nevertheless, I may observe that a proceeding was actually held by the Superintendent of Police before proposing to dismiss the Petitioner, but that the Petitioner could not avail of the opportunity to make his submissions against the punishment proposed, owing to his recalcitrant attitude and misconception about his legal position.

24. III. It was contended that after proceeding to hold an inquiry, Respondents cannot fall back upon the Proviso (a) to Article 311 (2) and in this connection reliance is placed upon the Supreme Court decision in *Akshaibar Lal v Vice Chancellor*, AIR 1961 SC 619. But that was a case where two alternative procedures were provided for by the relevant statutory provisions and it was held that after resorting to a general provision, the authority could not be allowed to take resort to the more strin-

gent provisions of the special procedure. That principle cannot apply to a case like the instant one where the constitutional provision itself says that no inquiry need be held and no opportunity need be given. This exemption is for the benefit of the administration and conducive to public interests, which cannot be forfeited by the administration by estoppel. This contention must therefore be rejected.

25. IV. It was next contended that the impugned order is bad because it does not give the reasons, as required by Reg 864 (b) of the Police Regulations as to why some punishment other than dismissal could not be awarded because the conviction did not involve moral turpitude. But reasons have in fact been given, namely, the service career of the Petitioner, having 22 punishments as against 5 rewards. Hence, this contention must be rejected.

26. The incidental argument that the service records were referred to without giving notice to that effect to the Petitioner would also not succeed because Art. 311 (2) is not applicable, as held by me

27. V. We now come to the claim for salary from January 2, 1960 to July 2, 1964, i.e., up to the date of dismissal. On this point, the Petitioner is entitled to succeed because there was admittedly no order of suspension passed against him at any time.

28. It is true that he absented himself from duty, but even then there was no notice given to him that his absence would be treated as leave without pay if he did not join at once. Even when his prayer for casual leave was rejected, no such order was communicated to him [Annexure 6/1]. In *Gopalkrishna v. State of Madh Pra*, AIR 1968 SC 240, the Supreme Court has held that no order under F. R 54 of the Fundamental Rules could be made without affording an opportunity to the person to be affected, of being heard on this matter specifically. The same principle should be applicable to the grant of leave without pay when the Petitioner did not ask for extraordinary leave and earned leave for some period was actually due to him (vide para 24 of the Petition), which was not rebutted.

29. In this view, the Rule will be made absolute in part, to this extent only that Respondents shall be commanded to pay to the Petitioner his full emoluments for the period from January 2, 1960 to July 2, 1964, as if he were on duty. There will be no order as to costs.

Petition partly allowed.

1970 CRI. L. J. 1228 (Vol. 76, C. N. 307) =
AIR 1970 JAMMU AND KASHMIR 135
(V 57 C 26)

ANANT SINGH, J.

Abdul Rehman and another, Accused v. State, Complainant.

Criminal Ref. Nos. 50 and 51 of 1969, D/- 26-5-1969.

(A) Criminal P. C. (1898), Section 263 — Summary trial — Examination of accused is not required to be signed by him in summary trial. (Para 7)

(B) Criminal P. C. (1898), Sections 263 (g) 242, 243, 251A (4) and (5) — Summary trial — Accused pleading guilty — Plea of guilt cannot be acted upon unless particulars of offence are clearly explained to him.

Even in a summary trial the accused must be told of the offence, and if he accepts it, he has to be told further, if he has any cause to show for it. On reading Sections 242, 243 and 251A (4) and (5) of Cr. P. C., it is clear that the plea of guilt under Section 263 (g) must be to an offence, which has to be clearly explained to the accused before his plea of guilt, can be acted upon. (Paras 8, 13)

The accused was tried under Sections 159/268 of the J. and K. Municipal Act. A question was put him whether on the particular day, he had brought within the Municipal area adulterated milk for sale, and the accused answered the question by saying 'yes' to it and he was convicted.

Held, the conviction was not proper inasmuch as the accused was not told that the carrying of adulterated milk within the Municipal Area was an offence and if he had any cause to show for it. It might be that the accused after admitting the facts constituting the offence, had some explanation for it. (Paras 14, 15)

Mahik Abdul Karim, Dy. Advocate General, for State

ORDER: These two References Nos. 50 and 51 of 1969 have been heard together and this judgment will govern both of them as they are on identical facts.

2. Abdul Rehman, and Abdul Gufar, were tried separately under the summary procedure by a Magistrate first class; both on a charge under Section 159/268 of the Municipal Act. Each was convicted, and sentenced to a fine of Rs 100, in default to one month's rigorous imprisonment on their pleading guilty, as it is said.

3. The charge against each was that on a particular day, each of the accused was carrying adulterated milk for sale in Srinagar. Both were caught by the police in Ghotabazar, and in due course, put on their trial.

4. The prosecution did not lead any evidence in support of the charge against either of the accused, but each of them was con-

victed, and sentenced in the manner aforesaid on his pleading guilty.

5. The learned Sessions Judge, in his reference, has pointed out that the confessional statement said to have been made by the accused before the trial court, was not signed by either of them, and hence the conviction of both was illegal inasmuch as the prosecution did not put in any evidence to support the charge.

6. The learned counsel Mr. Malik Abdul Karim, appearing on behalf of the State, has opposed the reference on the ground that a confessional statement of an accused, accepting his guilt, is not required to be signed by such accused in a summary trial, as this trial was Section 364 of the Criminal Procedure Code prescribes the manner of examination of an accused in a Criminal trial. Sub-clause (4) of Section 364 provides:

"Nothing in this section shall be deemed to apply to the examination of an accused person under section 263."

which in turn prescribes the procedure for recording of evidence in a summary trial including "the plea of the accused and his examination if any".

7. Section 364 supra, of course, requires an accused to sign his statement in ordinary trial, but as already pointed out, sub-cl. (4), of it does not apply to the examination of an accused under Section 263. It would thus appear that the learned counsel, Mr. Malik, is right in pleading that in a summary trial, the examination of an accused is not required to be signed by him.

8. The fact, nevertheless, remains that even in a summary trial the accused must be told of the offence, and if he accepts it, he has to be told further, if he has any cause to show for it.

9. For a summons trial, Section 242 of the Code requires that when the accused appears or is brought before the Magistrate "the particulars of the offence of which he is accused shall be stated to him, and he shall be asked, if he has any cause to show why he should not be convicted...."

10. The subsequent Section 243 then provides for the conviction of the accused on his admitting the offence, if he shows no sufficient cause, why he should not be convicted.

11. Again for the trial of warrant cases, sub-section (4) of Section 251-A of the Code requires the charge to be read, and explained to the accused when he is required to plead to the charge, admitting his guilt or claiming to be tried. As the subsequent sub-paragraph (5) provides, the Magistrate shall record the plea, and may in his discretion convict the accused, if he pleads guilty to the charge.

12. Sub-clause (g) of Section 263, which prescribes the mode of summary trial requires "the plea of the accused, and his examination, if any", to be recorded by the Magistrate.

13. Now the plea of guilt must be to an offence, which has to be clearly explained to the accused before his plea of guilt, can be acted upon.

14. In the two cases in hand, an identical question was put to each of the two accused, whether on the particular day, he had brought within the Municipal area adulterated milk for sale, and each of the two accused answered the question by saying 'yes' to it. I must observe that the examination of the accused was not sufficient inasmuch as none of the two accused was told that the carrying of adulterated milk within the Municipal Area was an offence, and if they had any cause to show for it. It may be that these accused after admitting the facts constituting the offence had some explanation for it. This was not done, and it was prejudicial to the accused.

15. Thus the conviction of the two accused was not proper inasmuch as neither of them, apart from merely admitting the facts of the question put to them, pleaded guilty to the charge, after having been told that the facts alleged constitute an offence.

16. The conviction of both the accused, and the sentence imposed upon them must be set aside as illegal, and they are so set aside. The References are accepted, yet for other reasons as stated above. The cases are remanded to the Magistrate for fresh trial, and disposal according to law. If the accused do not plead guilty after their proper examination, the prosecution will be at liberty to lead its evidence in support of the charge. References accepted.

1970 CRI. L. J. 1229 (Vol. 76, C. N. 308) =
AIR 1970 JAMMU AND KASHMIR 137
(V 57 C 27)

S. M. F. ALI, C. J.

Prem Avtar Bakshi, Petitioner v. State of Jammu and Kashmir and others, Respondents.

Habeas Corpus Petn. No. 73 of 1969, D/- 18-11-1969.

(A) Public Safety — J. & K. Preventive Detention Act (13 of 1964) S. 3 (1) (a) (i) and (2) — Term "Public Order" — Is not synonymous with "law and order".

An order of detention passed on ground that detenu was acting in a manner prejudicial to the maintenance of law and order is invalid and cannot be supported under Section 3. Section 3 (2) of the Act does not authorise the detaining authority to detain any person for maintenance of law and order at all. The term "maintenance of public order" and maintenance of law and order are not synonymous but there is a well-marked distinction between these two terms. AIR 1966 SC 740, Foll. (Paras 3, 4 and 7)

LM/AN/G329/69/GKC/M

While it may be necessary in the large interests of the country to detain a person whose activities are dangerous to the security of the State or whose existence may lead to public disorder affecting the entire community yet in the garb of exercising this power the executive should not be allowed to take recourse to the machinery of the Act, to solve law and order problem arising out of a local breach of the peace. Case law discussed. (Para 4)

(B) Public Safety — J. and K. Preventive Detention Act (13 of 1964), Sec. 3 (1) (a) (i) — Order of detention not in terms of section — Extraneous evidence cannot be given to cover up lacuna.

The provisions of S 3 (1) (a) (i) of the Act empower the District Magistrate to pass an order of detention only on the limited grounds mentioned in the section and it is not open to the District Magistrate to detain any person on a ground which is foreign to this provision and then later on seek to justify the same on the ground that he meant what was contained in the order. Such a course will amount to stultifying the right of liberty of a citizen. (Para 11)

Cases Referred: Chronological Paras

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|---------------------------------------|------|
| (1968) AIR 1968 SC 1303 (V 55) = | |
| 1968 Cri LJ 1490, Rameshwar Lal | |
| Patwari v State of Bihar | 4 |
| (1967) AIR 1967 Punjab 125 (V 54) = | |
| 1967 Cri LJ 510, Mohan Lal v. | |
| District Magistrate, Delhi | 8 |
| (1966) AIR 1966 SC 740 (V 53) = | |
| 1966 Cri LJ 608, Ram Manohar v. | |
| State of Bihar | 5, 7 |
| (1960) AIR 1960 SC 633 (V 47) = | |
| 1960 Cri LJ 1002, Supdt. Central | |
| Prison v Ram Manohar Lohia | 6 |
| (1950) AIR 1950 SC 124 (V 37) = | |
| 51 Cri LJ 1514, Romesh Thappai | |
| v State of Madras | 6 |
| R C Mehta, for Petitioner, Addl Advo- | |
| cate General, for Respondents. | |

ORDER: This is a writ of Habeas Corpus directed against an order of detention passed by the District Magistrate, Jammu dated 13-9-69. The petition arises in the following circumstances

2. The petitioner is a journalist by profession and is the editor of a fortnightly news magazine called the Kashmir Post. The petitioner was arrested and detained in the Special Jail on the morning of 14-9-69 under a detention order passed by the District Magistrate Jammu dated 13-9-69. The petitioner seeks to challenge this order before me mainly on two grounds. In the first place the counsel for the petitioner submitted that the order not being in terms of Section 3 (2) of the Preventive Detention Act (hereinafter to be referred to as the Act) was clearly invalid and therefore the detenu was entitled to be released. Secondly it was submitted that the grounds served on the petitioner are extremely vague and ambiguous and on this ground also the order of

detention was bad. In order to appreciate the contentions of the petitioner it will be necessary to quote the detention order passed by the District Magistrate which runs thus:

"Whereas I, Ashok Jaitly, District Magistrate, Jammu am satisfied that with a view to preventing Shri Prem Avtar Bakshi s/o Late Bakshi Hukum Chand r/o Moholla Pratap Garh Jammu P/S City Jammu, District Jammu from acting in a manner prejudicial to the maintenance of law and order, it is necessary so to do.

Now therefore in exercise of the powers conferred by Section 3 (2) read with Section 5 of the J, and K Preventive Detention Act, 1964, I Ashok Jaitly District Magistrate, Jammu, hereby direct that the said Shri Prem Avtar Bakshi be detained in Central Jail, Jammu, subject to such conditions as to maintenance of discipline and punishment for breaches of discipline as have been specified in the Jammu and Kashmir Detenu's General Order of 1968. He be placed in Class (B)."

3. The relevant portion of this order which impelled the District Magistrate to detain the petitioner is that according to him the petitioner was acting in a manner prejudicial to the maintenance of law and order. Section 3 (2) of the Act under which the detention order purports to have been passed does not authorise the detaining authority to detain any person for maintenance of law and order at all, but the words used in Section 3 (1) (a) (i) of the Act are as follows.

"The Government may

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to

(i) the security of the State or the maintenance of public order
it is necessary so to do, make an order directing that such person be detained."

4. The District Magistrate appears to have been under the impression that maintenance of public order and of law and order are synonymous. In my opinion the view taken by the District Magistrate is wholly incorrect and cannot be supported. The right of liberty is an extremely valuable and cherished right of a citizen under our democracy. The right is a fundamental right and has been guaranteed by the Constitution of India. It is therefore manifest that any curb or restriction on a citizen's right to free movement or to the freedom of speech must be very carefully and cautiously scrutinized by the courts and if any technical flaw is found in the order of detention which does not fall within the spirit and letter of the law of detention, the detenu must be given the benefit of such a lacuna. While it may be necessary in the large interests of the country to detain a person whose activities are dangerous to the security of the State or whose existence may lead to public disorder affecting the entire

community, yet in the garb of exercising this power the executive should not be allowed to take recourse to the machinery of the Act, to solve law and order problems arising out of a local breach of the peace. Furthermore, an order of detention is passed on the subjective opinion of the detaining authority and is incapable of being tested by cross-examination of that authority or by production of other evidence in defence. This is an additional reason why the orders of detention should be meticulously examined by the courts with a view to finding out whether or not they are within the ambit of the relevant law. In AIR 1968 SC 1303, 1305 their Lordships of the Supreme Court made the following observations:—

“However, the detention of a person without trial merely on the subjective satisfaction of an authority however high is a serious matter. It must require the closest scrutiny of the material on which the decision is formed, leaving no room for errors or at least avoidable errors. The very reason that the courts do not consider the reasonableness of the opinion formed or the sufficiency of the material on which it is based indicates the need for the greater circumspection on the part of those who wield this power over others.”

5. Similar observations were made by Sarkar J. in *Ram Manohar v. State of Bihar* AIR 1966 SC 740, 745 where his Lordship observed as follows:

“If a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. We are dealing with a statute which drastically interferes with the personal liberty of people, we are dealing with an order behind the face of which a Court is prevented from going.”

6. I have already pointed out above that the order of detention (*Supra*) does not purport to be in terms of the Act and on this ground alone the order of detention cannot be supported. The Addl. Advocate General, however, submitted that the terms ‘public order’ and ‘maintenance of law and order’ connote one and the same thing and therefore even if the words ‘maintenance of public order’ have been inadvertently omitted by the District Magistrate in his order, that would not vitiate the detention of the petitioner. In support of his proposition the Addl. Advocate General relied on a decision of the Supreme Court in AIR 1950 SC 124. This decision appears to have been noticed by the Supreme Court on several later occasions particularly in *Supdt. Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633 where Subba Rao, J. (as he then was) observed as follows:—

“Public order is synonymous with public safety and tranquillity: it is the absence of

disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.”

7. The term ‘public order’ was again considered by the Supreme Court in AIR 1966 SC 740 (*Supra*) and the previous decisions on the point were distinguished thus:

“These observations determine the meaning of the words ‘public order’ in contradistinction to expressions such as ‘public safety’, ‘security of the State.’ They were made in different contexts. The first three cases dealt with the meaning of the legislative Lists as to which it is settled, we must give as large meaning as possible. In the last case the meaning of ‘public order’ was given in relation to the necessity for amending the Constitution as a result of the pronouncement of this court. The context in which the words were used was different, the occasion was different and the object in sight was different.”

Their Lordships pointed out that on the previous occasions the court was considering the term ‘public order’ appearing in the Legislative Entry List and therefore a wider connotation had to be given to the words ‘public order’, but the definition of the term appearing in the Defence of India Rules or in any other provision relating to detention of a person would have to be construed differently. In this connection Hidayatullah, J. (as he then was) observed as follows:—

“We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other serious and cataclysmic happenings. Does the expression public order take in every kind of disorders or only some of them? The answer to this serves to distinguish ‘public order’ from ‘law and order’ because public order if disturbed must lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act.”

disturbances which subvert the public order etc. A District Magistrate is entitled to take action under Rule 30 (1) (b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances”.

It is therefore clear that the terms public order and law and order cannot be regarded as synonymous, but there is a well-marked distinction between these two terms and this distinction must be clearly borne out when construing the provisions of a detention statute.”

8. The Supreme Court decision (Supra) was followed by Bedi, J. in a decision of the Punjab High Court in AIR 1967 Punj 125.

9. For the reasons given above the argument of the Addl Advocate General is overruled.

10. It was next contended by the Addl. Advocate General that even though the order of detention does not mention the words ‘maintenance of public order’, in his affidavit the District Magistrate has clarified the position that his intention was to detain the petitioner in order to prevent him from acting in a manner prejudicial to the maintenance of public order. In this connection my attention was drawn to para (9) of the counter-affidavit of the District Magistrate which runs thus.—

“Contents of paragraph 9 of the petition are denied. It is further added that the deponent after applying his mind independently was satisfied that with a view to preventing the petitioner from acting in a manner prejudicial to the maintenance of public order, it was necessary to detain him.” I am of the view that where the order of detention itself is not in terms of the requirements of the statute, no extraneous evidence can be given to cover up the lacuna. The intention of the detaining authority has to be gathered from the language used by it in the detention order and not by what it would like to say at a later stage. It is well settled that where a statute requires certain things to be done in a particular manner, there can be no departure from such a manner.

11. In the instant case the provisions of Section 3 (1) (a) (i) of the Act empower the District Magistrate to pass an order of detention only on the limited grounds mentioned in the section and it is not open to the District Magistrate to detain any person on a ground which is foreign to this provision and then later on seek to justify the same on the ground that he meant what was contained in the statute and not what was contained in the order. Such a course will amount to stultifying the right of liberty of a citizen. This point was also taken by Hidayatullah J (as he then was) in his majority judgment whose similar view was expressed in the following words:—

‘Law and order represents the largest

circle within which is next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression ‘maintenance of law and order’ the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules.”

x x x x x
“In our judgment the order of the District Magistrate exceeded his powers. He proposed to act to maintain law and order and the order cannot now be read differently even if there is an affidavit the other way.”

12. In view of the reasons given by me the second contention of the Addl. Advocate General is also overruled.

13. As the petition, in my opinion, succeeds on the first point raised by the petitioner, it is not necessary for me to go into the other points relating to the vagueness of the grounds of detention at all. A bare perusal of the grounds of detention would leave no manner of doubt that the grounds are both vague and ambiguous. The petitioner is said to have incited some persons to indulge in acts of violence because their demands had not been met, but no details have been given in the grounds as to who these people were, what were the nature of the demands made by them, and why it was not possible to concede these demands. Unless these details are supplied to the detenu, it is not possible for him to make an effective representation to the Government against his detention.

14. For the reasons given above, the petition is allowed, the order of detention is held to be invalid and the petitioner is directed to be released from custody forthwith.

Petition allowed.

1970 CRI. L. J. 1232 (Vol. 76, C. N. 309) =

AIR 1970 MADRAS 343 (V 57 C 99)

KRISHNASWAMY REDDY, J.

Palaniswami Gounder and others, Petitioners v State of Madras Represented by Taluk Supply Officer, Karur, Respondent

Criminal Revn Cases Nos 373 etc of 1967, D/- 30-12-1969, against judgment of S Court, Tiruchirappalli in C A No. 14 of 1967

(A) Madras Paddy and Rice (Movement Control) Order (1966) — Validity — Order is invalid because before passing it the State Government had not formed an opinion that it was necessary and expedient for purposes mentioned in S. 3(1), Essential Commodities Act. W. P. Nos. 1274 of 1968 and 2869 of 1967 (Mad), Foll. (Para 8)

DN/EN/B762/70/YPB/C

(B) Madras Paddy and Rice Dealers (Licensing and Regulation) Order (1966) — Validity — Order is invalid since State Government had not formed opinion that it was necessary and expedient for purposes mentioned in S. 3(1), Essential Commodities Act. W. P. Nos. 1274 of 1968 and 2869 of 1967 (Mad), Foll. (Para 9)

Cases Referred: Chronological Paras

(1969) 1969-2 Mad LJ 324 = ILR

(1969) 1 Mad 243, State of Madras v. Vanamamalai Mutt 5, 7

(1967) W. P. Nos. 1274 of 1968 and 2869 of 1967 (Mad) 7, 9

S Sethuratnam, T. Somasundaram, B. Soundarapandian, Fyzee Mohmood, V. C. Palaniswami, G. Gopalaswami, A. Nagarajan, T. S. Arunachalam, S. R. Srinivasan, V. P. Raman, K. A. Panchapakesan, N. Chandrasekaran, M. Srinivasagopalan, S. Ramasubramaniam, B. Sriramulu, T. N. Anandanayaki, R. Santanam, K. N. Balasubramaniam, N. Sivashanmugham, K. Santhanam, C. K. Venkatanarasimhan, C. Chinnaaswami, V. Narayanaswami, R. S. Venkatachari, S. Ramalingam, K. Raman, C. K. Vijayaraghavan, E. S. Govindan and M. Srinivasan, for Petitioners; Asst. Public Prosecutor, for State.

ORDER:— Batch I.— In all these petitions, a common point has been raised that the prosecution under Cl. 3 of the Madras Paddy and Rice (Movement Control) Order 1966 (hereinafter called 'the Order') is unsustainable for the reason that the said order is invalid as the condition requisite for passing such an order has not been conformed

2. The Madras Paddy and Rice (Movement Control) Order 1966 the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1966 and the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order, 1966, were all passed by the State of Madras on 28th June 1966. These orders were made in exercise of the powers conferred by Section 3 of the Essential Commodities Act 1955 (Central Act 10 of 1955) read with the Government of India, Ministry of Food, Agriculture, Community Development and Co-operation (Department of Food) Notification G. S. R. 906 dated 9th June 1966

3. Section 3(1) of the Essential Commodities Act (hereinafter called the 'Act') reads thus —

"If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein"

Section 5 of the same Act runs thus:

"The Central Government may, by

notified order direct that the power to make orders under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by—

(a) such officer or authority subordinate to the Central Government or (b) such State Government or such officer or authority subordinate to the State Government, as may be specified in the direction"

By virtue of Section 5 of the Act, the Central Government in Notification G. S. R. 906 dated 9-6-1966, published in the Extraordinary issue of the Gazette of India, delegated its power to the State Government exercisable under Section 3 of the Act.

3-A. It is contended by the learned counsel for the petitioners in these cases that the impugned order is not valid as it is not proved that before the order was passed, the State Government as required under Section 3 of the Act had formed the opinion that it was necessary or expedient to pass such an order for the purposes mentioned therein. The preamble of the order does not show that such opinion was formed by the State Government before passing the order. Nor was any material placed before this Court that such opinion was formed by the State Government. But the Secretary to Government, Food Department, Government of Madras, filed an affidavit on the 12th December 1969, stating that he consulted the Food Minister, had a discussion over the matter and on his specific instructions, the order in question came to be passed and issued. It is not the case of the State before me that it was not necessary to form an opinion provided under Section 3(1) of the Act. But it is stated that such opinion was formed in consultation with the Minister concerned

4. The question now is, in the absence of a recital in the preamble itself that the State Government had formed an opinion that it was necessary and expedient for the purposes mentioned therein and in the absence of placing any material before the Court that such opinion was formed, whether the affidavit filed by the Secretary at this late stage without any other material to corroborate the averments made in the affidavit, specially when controverted by the counsel for the petitioners, can be accepted

5. We have already noted that besides the impugned order, the other two orders, namely, the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1966 and the Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1966, were passed on 28th June 1966. On an earlier occasion, the validity of the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1966 was challenged on several grounds one of the grounds being that the State

Government before passing that order did not form an opinion that it was necessary or expedient to pass the said order. Kailasam, J. who heard the petition, held that the State Government had not complied with the provisions of Section 3(1) of the Act before issuing the said order. On an appeal filed against that order, the Division Bench consisting of Anantana-
 rayanan, C. J. and Natesan, J. agreed with Kailasam, J. on this point and held that there was no material to show that the State Government complied with the requirements of Section 3 (1) of the Act. It may be relevant to note the following observations made by the Division Bench in *State of Madras v. Vanamamalai Mutt*, (1969) 2 Mad LJ 324 at p. 351:

"The objection taken for the respondent is not a mere technical one. Drastic powers could be taken by the State and its enforcement entrusted to a whole hierarchy of officials. The Government has to exercise its mind and consider whether the situation demanded the assumption of such powers, and the expediency of the course. These are matters to be determined at the highest level of the Government to its subjective satisfaction. Matters of policy and expediency are executive functions, and if the opinion had not been formed at the relevant time the fact that later on the State Government stands by the order is neither here nor there. The State Government is here acting as delegate of the Central Government and of the Parliament which permitted the delegation, the pre-condition for its exercise of the delegated power being the formation of opinion as to the necessity or expediency for the order. In the absence of such an opinion, the Government has no power to issue the order.

Having regard to the importance of the matter and the fact that the order is for regulating and providing for equitable distribution of paddy and rice, despite objection by counsel for the respondents, we invited the learned Advocate General to satisfy us even though it was the appellants' case that the Government had formed an opinion before the issue of the order in question. To facilitate the production of the relevant material, we also adjourned the hearing. But the Advocate General could not satisfy us that the Government was at the relevant point of time satisfied about the necessity or expediency of the order. The Advocate General placed before us certain files relating to the passing of the order in question and frankly stated that it does not appear that the matter went up to the stage of consultation at the ministerial level before passing of the impugned order. We regret to notice that a matter of such considerable importance affecting the rights and liberties of the people does not appear to have

been considered by any Minister. As we have stated earlier, there was current then, the Madras Paddy and Rice (Declaration and Requisitioning of Stock) Order 1964, issued under Rule 125 of the Defence of India Rules. As a routine matter in supersession of that order, the present order under the Essential Commodities Act has been issued. From the notings on the files, produced, it appears to have been thought sufficient if orders under the Defence of India Rules were re-issued under the Essential Commodities Act, utilising the occasion for incorporating whatever changes were considered necessary."

6. It is significant to note that either before Kailasam, J. or before the Division Bench, no affidavit has been filed similar to the one filed before me stating that only after oral consultation with the Minister concerned the order was passed. I emphasise this fact for the reason that, as already noted, the impugned order in these petitions has been passed along with two other orders, one of which was the subject-matter of the decision of the Division Bench. If oral consultation was a fact, there is absolutely no reason for the Secretary concerned for not having filed an affidavit about the alleged consultation. On the other hand, we observed in the observation made by the Division Bench that the Advocate General placed before them certain files relating to the passing of the order in question and frankly stated that it did not appear that the matter went up to the stage of consultation at the ministerial level before passing of the impugned order. It is not the case of the prosecution that there were different files in respect of passing of the three orders. No such material was placed before me.

7. Later, the validity of Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1966 was questioned in *W. P. Nos 1274 of 1968 and 2869 of 1967* (Mad) subsequent to the decision in 1969-2 Mad LJ 324 of the Division Bench, D/- 23-10-1967. In those petitions the Secretary to Government, Food Department, filed an affidavit stating that the impugned order was passed after carefully going through all the formalities, prescribed therefor and before issue of such order, he (the Secretary) contacted the then Food Minister, had a discussion over the matter and on his specific oral instructions, the order in question came to be passed and issued. The same secretary filed the present affidavit which is the exact reproduction of the averments made in the earlier affidavit. Kailasam, J. held that in the absence of any corroborative material in the file and the fact that an affidavit was not filed on an earlier occasion when another order was the subject-matter before himself and later before the Division Bench, he was not persuaded to accept the statement

made by the Secretary, and rejected it. The learned Judge ultimately held that that order was invalid. I respectfully agree with the observation of Kailasam, J. in respect of the affidavit filed by the Secretary to Government, Food Department.

8. In the affidavit filed before me, we do not have even the minimum details of the alleged oral discussion between the Secretary and the Food Minister, such as, the date and the time of discussion. The date of discussion may be relevant especially when it is not supported by any document, for the opposite side to know whether such a discussion could have taken place on the alleged date. It may be open to the opposite side, if certain date is given, to contend that the concerned Minister was on camp or that he would not have been available on the alleged date and time. I, therefore, hold that it is not established that before passing the impugned order, the State Government formed an opinion that it was necessary and expedient to pass such an order for the purposes mentioned in Section 3(1) of the Act. The impugned order is invalid. The convictions and sentences of the petitioners in all these cases are set aside. The pending proceedings in certain cases are set quashed. The fines, if paid, will be returned to the respective petitioners. The orders of confiscation in these cases are set aside. The lorries concerned in CrI. R. C 1234 and 1441 of 1967 and 110, 116 and 392 of 1968 will be returned to the respective petitioners. The sale proceeds of the paddy or rice as the case may be, would be returned to those persons who are entitled to them. On the applications filed by the parties, the lower Court will go into the question of ownership of the paddy or rice as the case may be and after due enquiry shall return the same to the persons entitled to them. The properties concerned in CrI R C. 666 and 667 of 1968 will be disposed of by the lower Court after enquiry. The revision petitions are allowed.

9. Batch II. In all these petitions the petitioners were convicted under Cl 3 of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1966 read with Section 7(1) (a) (ii) of the Essential Commodities Act, 1955. For the reasons given by me in the order relating to the previous batch, I hold that this order is also invalid. No affidavit has been filed by the Secretary to Government, Food Department, similar to the one filed in the previous batch. Kailasam, J in W. P Nos 1274 of 1968 & 2869 of 1967 (Mad) held that the impugned order is invalid. I respectfully agree with him. The convictions and sentences of the petitioners in these cases are set aside the fines, if paid, will be refunded to the respective petitioners. The orders of con-

fiscation in these cases are set aside. The sale proceeds of the paddy or rice as the case may be would be returned to those persons who are entitled to them. On the applications filed by the parties, the lower Court will go into the question of ownership of the paddy or rice as the case may be and after due enquiry, shall return the same to the persons entitled to them.

10. The revision petitions are allowed.

Revision allowed.

1970 CRI. L. J. 1235 (Vol. 76, C. N. 310)=

AIR 1970 PATNA 322 (V 57 C 57)

N. L. UNTWALIA, J.

Chaurasi Manjhi and another, Petitioners v. State of Bihar, Opposite Party.

Criminal Revn. No. 97 of 1969, D/- 1-8-1969, against decision of Addl S J. IInd Court, Bhagalpur, D/- 28-11-1968.

Penal Code (1860), Ss. 324 and 326 — Instrument for cutting — Tooth is instrument for cutting and serves as weapon of offence and defence — Injury by tooth-bite is offence under Section 324 or 326 depending upon whether injury is simple or grievous. (Para 3)

Shilesh Chandra Misra and Amar Singh, for Petitioners; G. P. Jaiswal, for State.

ORDER :— The prosecution case is that on the 30th August, 1965, at about 8 A.M. when Dasrath Manjhi (P.W. 1) was returning to his house from village Ramchandrapur, near a well of Aman Mandal in his village Sonudih Gangati, petitioner Jagdish Manjhi dealt a lathi blow on his left hand, injuring his left ring finger from behind, and petitioner Chaurasi Manjhi dealt two lathi blows on each of his thighs, whereupon petitioner Jagdish Manjhi gave a lathi blow on the root of his neck. P.W. 1 fell down. Petitioner Jagdish Manjhi rode on his chest and bit his lower lip with teeth, causing bleeding injury. A first information report was lodged, but the Police submitted a final report, saying that it was a case under Section 323, Indian Penal Code which was non-cognisable. The case proceeded on trial upon a complaint filed by P.W. 1. The defence was that the prosecution case was not true. Both the Courts, believing the prosecution evidence have found the petitioners guilty. Petitioner Chaurasi Manjhi has been convicted under Section 323 of the Penal Code and sentenced to undergo rigorous imprisonment for two months. Petitioner Jagdish Manjhi has been convicted under Section 324 of the Penal Code and has been sentenced to undergo rigorous imprisonment for six months.

2. The only point which could be urged, and has been urged, in support of this

CN/CN/B316/70/DGB/D

application in revision is that for a tooth-bite conviction of petitioner Jagdish Manjhi under Section 324 of the Penal Code is not legal. It has also been urged that the sentence imposed upon the petitioners is excessive.

2-A. The relevant words in Sec. 324 of the Penal Code are —

"Whoever voluntarily causes hurt by means of any instrument for..... cutting shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both"

The question is whether tooth is an instrument for cutting within the meaning of Section 324 of the Penal Code. There is no authority on the point either way. Some indication of it is to be found in an unreported decision of the Bombay High Court given by Beaumont, C J and Sen, J, in the book of Ratanlal and Dhirajlal "Law of Crimes", under Section 326 of the Penal Code. The case noticed there is that where a mistress refused to accompany her paramour, who got enraged and bit off the tip of her nose and dislocated one of her teeth, a sentence of two months' rigorous imprisonment was enhanced to one of fourteen months. It is, of course, not very clear from this line alone as to whether the biting on the tip of the nose was considered as a grievous injury caused by teeth or whether the dislocation of one of her teeth was caused by some other instrument. I cannot, therefore, be sure upon that line mentioned in the annotation of the book referred to above.

3. Considering the question, however, myself with reference to the meaning of the words "instrument" and "tooth" in Webster's Third New International Dictionary, I have come to the conclusion that tooth will be an instrument for cutting. According to the said dictionary, "instrument" means "a means whereby something is achieved, performed, or furthered". Although tooth is a part of the body, but there is no difficulty in taking the view that it is a means whereby something is achieved, performed or furthered, and, therefore, it can be characterised as an instrument within the meaning of Section 324 of the Penal Code as also under Section 326, if grievous injury is caused by tooth. According to the same dictionary "tooth" means "one of the hard bony appendages that are borne on the jaws or in many of the lower vertebrates on other bones in the walls of the mouth or pharynx and serve esp for the prehension and mastication of food and as 'weapons of offence and defence' (the underlining (here in ') is mine). Reading the dictionary meaning of the words "instrument" and "tooth" therefore, I have unhesitatingly come to the conclusion that for simple injury

caused by tooth bite, the offender will be guilty under Section 324 of the Penal Code. If grievous injury is caused by such bite, he will be guilty under Section 326 of the Penal Code. In my opinion, therefore, petitioner Jagdish Manjhi has rightly been convicted under Section 324 of the Penal Code. It may also be added that according to the finding, he has caused simple injury by lathi blow to Dasrath Manjhi. There would have been no difficulty, therefore, in convicting him under Section 323 of the Penal Code.

4. Having considered the facts, the circumstances and the nature of the injury caused to Dasrath Manjhi (P W. 1) I think, it will be no use sending petitioner Chaurasi Manjhi to jail again. It is said that he has been in jail for about a week. While maintaining his conviction under Section 323 of the Penal Code, I reduce his sentence of imprisonment to the period already undergone. Petitioner, Jagdish Manjhi was the greater aggressor out of the two. He deserves more severe sentence than the one which stands after my modification of petitioner Chaurasi Manjhi. Jagdish Manjhi's case also deserves some concession in regard to the period of sentence. I, therefore, while maintaining his conviction under Section 324 of the Penal Code, reduce his sentence of imprisonment from six months to three months rigorous imprisonment.

5. Subject to the above modification in the sentences of the two petitioners, this application in revision is dismissed.

Revision dismissed

1970 CRI. L. J. 1236 (Vol. 76, C. N. 314) =

AIR 1970 MADRAS 351 (V 57 C 103)

KRISHNASWAMY REDDY, J.

Public Prosecutor, Appellant v Perumal Naidu and others, Respondents

Criminal App Nos 413 and 494 of 1966 etc, Cri. R. C. No. 258 of 1966, etc. D/- 16-12-1969.

(A) Madras Paddy and Rice (Movement Control) Order (1965) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 3)

(B) Madras Paddy and Rice (Movement Control) Order (1964) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125(3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 5)

(C) Madras Paddy and Rice Dealers (Licensing and Regulation) Order (1965)

EN/EN/C254/70/YPB/C

— Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125(3-A) Defence of India Rules (1962) came into force on 25-5-1965. (Para 6)

(D) Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1964) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 6)

(E) Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1964) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125(3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 7)

The Assistant Public Prosecutor, for the Appellant, C K Venkatanarasimhan, N. Dhinakaran and P. C Kurian, for the Respondents in Crl Appeals, C K. Venkatanarasimham, M. Narayanamurthi, G. Gopalaswami, C. F. Louis, S. S. Bharadwaj, M. Suganathan, K. Ramachandran, R. Sundaralingam, R. Santhanam, P. R. Vasudeva Iyer, T. S. Arunachalam, B. Soundarapandian, R. Shanmugham, Fyzwe Mohammed, S. M. Subramaniam, S. R. Srinivasan, V. P. Raman, K. A. Panchanakesan, L. J. A. Menezes, M. S. Sethu and K. Gopalachari, for the Petitioners (in Crl. R. Cs.).

JUDGMENT:— First Batch — These cases relate to offences under the Madras Paddy and Rice (Movement Control) Order, 1965. The only point raised in these cases is that the Madras Paddy and Rice (Movement Control) Order, 1965 is not valid on the ground that the concurrence of the Central Government was not obtained within thirty days after sub-rule (3-A) of Rule 125 of the Defence of India Rules, 1962 came into force. Sub-rule (3-A) of Rule 125 of the Defence of India Rules came into force on 20-5-1965. The Madras Paddy and Rice (Movement Control) Order, 1965 was passed in exercise of the powers conferred by sub-rule (2) of Rule 125 of the Defence of India Rules, 1962 read with sub-rule (3) and clause (b) of sub-rule (9) of that rule, by the Governor of Madras, which came into force on 1-1-1965. At the time when the Madras Paddy and Rice (Movement Control) Order 1965 was passed, sub-rule (3-A) to Rule 125 of the Defence of India Rules was not in force. Therefore, it may be necessary to examine the scope of sub-rule (3-A) of Rule 125, which runs thus:

"Notwithstanding anything contained in sub-rules (2) and (3), an order under these sub-rules for regulating by licences,

permits or otherwise the movement of transport of any foodstuffs including edible oil-seeds and oils, or for controlling the prices or rates at which any such foodstuffs may be bought or sold, shall not be made by the State Government after the commencement of the Defence of India (Third Amendment) Rules, 1965, except with the prior concurrence of the Central Government, and any order made before such commencement under these sub-rules for any of the purposes aforesaid by a State Government or any officer or authority authorised by it in that behalf shall cease to have effect on the expiry of a period of thirty days from such commencement except as respects things done or omitted to be done before such expiry, unless such order is confirmed by Central Government before such expiry." The latter portion of sub-rule (3-A) is relevant in respect of these cases. It is clear that in respect of the order in question, unless the confirmation of the Central Government is obtained on or before 20-6-1965, it would expire. The prosecutions in all these cases were in relation to matters done or omitted to have been done after 20-6-1965. These things done or omitted to have been done before 20-6-1965 would be valid for the simple reason that this order was in force till that time.

2. The question that arises in respect of these cases where the prosecution was launched in respect of certain things done or omitted to be done after 20-6-1965 is whether the confirmation as required under sub-rule (3-A) was obtained by the State Government from the Central Government. The learned Public Prosecutor admits that there is no notification published in the Gazette of India in respect of confirmation of this order. But, however, he drew my attention to a letter purported to have been sent by the Ministry of Food and Agriculture, Government of India, under the signature of the Under Secretary, dated 11-6-1965, addressed to the Secretary to the Department of Food and Agriculture, Government of Madras, stating that with reference to their letter dated 31st May 1965, he was directed to state that the Government have confirmed the following orders which includes (1) The Madras Paddy and Rice (Movement Control) Order, 1965; (2) The Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1964, and (3) The Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1965.

3. It is contended for by the learned counsel, appearing for the accused in all these cases, that the letter sent by the Under Secretary, Ministry of Food and Agriculture to the Secretary to Government, Department of Food and Agriculture, Government of Madras, stating that the Government of India had confirmed

the order in question is not sufficient compliance under sub-rule (3-A) of rule 125. It is further contended that such confirmation must not only be made by the Central Government but also it must be made by a notification published in the Official Gazette of the Government of India. There is force in their contention. A mere letter passed between the two Governments would not be sufficient to validate the order unless the confirmation, which is the condition precedent, to validate the order is officially notified, so that the citizens who are affected by such order will know whether the order had come into force for them to obey. In the absence of such notification in the Official Gazette and much less in the absence of evidence that such confirmation was made by the Central Government, excepting the letter that has been produced before me, I am of the view that sub-rule (3-A) was not complied with and eventually, I hold that this order had expired on the 20th June 1965 for the reason that no valid confirmation was obtained within a month after sub-rule (3-A) came into force.

4. All the prosecutions in respect of offences committed after 20-6-1966 under this order are quashed. All the convictions and sentences passed under this order are set aside. The appeals filed by the Public Prosecutor are dismissed. The revisions filed by the accused are allowed. The order of confiscation made in all these cases on a conviction or irrespective of the conviction are all set aside. The sale proceeds in respect of the properties seized in all these cases are directed to be returned to those persons who claim them on their filing applications before the lower courts. The fines, if paid, will be refunded to the petitioners.

5. Second Batch.— These appeals were filed by the Public Prosecutor against the order of acquittal of the accused in these cases, by the Judicial Sub-Magistrate, Madurai in respect of offences under S 3 of the Madras Paddy and Rice (Movement Control) Order 1964. The offences in these cases were said to have been committed on 23-10-1965, 23-9-1965 and 22-11-1965 respectively after sub-rule (3-A) or Rule 125 of the Defence of India Rules came into force, which was on 20-5-1965. For the reasons given by me in the earlier batch just now disposed of, I hold that the order under which the respondents were prosecuted, expired on or after 20-6-1965. These appeals are dismissed.

6. Third Batch.— In this batch, CrI R C 315 of 1966 and 91 of 1967 relate to offences under the Madras Paddy and Rice Dealers (Licensing and Regulation Order 1965 and CrI. R C 316 of 1966 relates to the offence under the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1964. In these cases, the offences were committed subsequent to 20-6-1965. For the reasons given by me in the first batch of cases, I hold that the orders were not valid at the time the offences were committed. The proceedings concerned in CrI R C. Nos 315 and 316 of 1966 are quashed. The conviction of the petitioners in CrI. R C. 91 of 1967 are set aside and the fine, if paid, will be refunded to the petitioners. The confiscation in these cases are set aside. The sale proceeds of the properties seized would be returned to the claimants by the lower court after due enquiry.

7. Fourth Batch:— These two cases relate to offences under the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1964. The offences in these cases were committed subsequent to 20-6-1965. For the reasons given by me in the first batch of cases, I hold that the order in question was not valid at the time the offences were committed. The convictions and sentences are set aside. The fine, if paid, will be refunded to the petitioners. The confiscation in these cases are set aside. The sale proceeds of properties seized would be returned to the claimants by the lower Court after due enquiry.

Order accordingly.

1970CRI. L. J. 1238 (Vol. 76, C. N. 312)=

AIR 1970 MADRAS 359 (V 57 C 106)

K. N. MUDALIAR, J.

In re, L. N. Srinivasa Chetty, Petitioner
Accused

Criminal Revn Case No 758 of 1967 and Criminal Revn Petn No 748 of 1967, D/- 1-8-1969, against Order of Addl First Class Magistrate Vellore, D/- 31-3-1967.

Penal Code (1860), Ss. 332 and 323 — Applicability — Seizure of cycle by Inspector for want of licence — Accused slapping inspector on his cheek and forcibly taking away cycle — Evidence showing that cycle had licence — It was also found that inspector was acting in his capacity as public servant and in discharge of his official duties — Held, accused was guilty of offence under S. 332 and not under S. 323 — He being first offender, interest of justice would be served by admonishing him under S. 3(1) of Act 20 of 1958. AIR 1948 Mad 356 & 1962 (1) Cri LJ 45 (Mad), Dist.— (Probation of Offenders Act (20 of 1958), S. 3 (1)) — (Criminal P. C. (1898), S. 562 (1-A)). (Para 3)

[Ed — Section 332, I P C prescribes 3 years' sentence and/or fine. Fine was substituted by admonition (?)]

LM/DN/F799/69/AKJ/T

Cases Referred: Chronological Paras

(1962) 1962 (1) Cri LJ 45 = 1961
 Mad WN (Cri) 117, Public Prosecu-
 tor v. Syed Rowther 3
 (1948) AIR 1948 Mad 356 (V 35) =
 1948 Mad WN (Cri) 68, Pedda
 Muni v. Emperor 3
 K. Ramaswamy, for Petitioner; S Jaga-
 desan, for Public Prosecutor, for State.

ORDER:— On 11-1-1967 the cycle of the son of Srinivasa Chetty was detained by the Municipal Inspector, P. W. 1 for want of a license. The boy went and brought his father who slapped P. W. 1 on his cheek and took away the cycle from him by force. The evidence of P. W. 1 who proves these facts is corroborated by P. W. 2. P. W. 3 received the complaint from P. W. 1 and sent P. W. 1 and the complaint to the police station P. W. 4, the doctor, speaks to the injury sustained by P. W. 1.

2. Accepting this evidence, the Additional First Class Magistrate found the petitioner guilty of an offence under Section 332, I. P. C.

3. P. W. 1 admits in the course of his cross-examination that if the cycle had village licence he would not demand licence and states that the boy Chelapathi, son of the accused, did not tell him that he had village licence. Exhibit D-2 is the village licence for 1966-67 for the second half year. It has been issued in the name of the accused. M. O. 2 is the disc in respect of that licence. It emerges from the evidence that the cycle did not carry this disc. The argument of Mr. Ramaswami is that inasmuch as the cycle in question had the licence from the village panchayat and regardless of the fact that the disc was not displayed on the cycle, although P. W. 1 had acted in his capacity as a public servant in the discharge of his duties, the seizure is illegal and therefore, the petitioner had a right to take back his cycle and his act of slapping P. W. 1 amounts to an offence under Section 323, I. P. C. This argument, if accepted, would result in an anomalous reasoning whether P. W. 1 acted as a public servant in the discharge of his official duties and this illogical finding regarding his act of seizure is not in consonance with law. I am not prepared to countenance this argument in the face of the evidence which certainly supports the finding that P. W. 1 was acting in his capacity as a public servant and in the discharge of his official duties he seized the cycle. The seizure of the cycle is correct and legal. Apart from that, I have no doubt in my mind that P. W. 1 was doing an act in his capacity as a public servant, acting in good faith under the colour of his office. The act of P. W. 1 is also strictly justifiable by law.

In support of the proposition of law contended for by Mr. Ramaswami, he at-

tempted to draw support from the ruling in Pedda Muni v. Emperor, 1948 Mad WN (Cr) 68 = (AIR 1948 Mad 356). That was a case where the constable P. W. 1 had no authority to effect the arrest since there was no order in writing under Section 56(1) of the Code of Criminal Procedure and the constable did not purport to act on his own accord, because there was nothing to show that the elements necessary to justify the action under Section 54, Criminal P. C. were present, the Act of P. W. 1 was not that of a public servant but of an ordinary individual. Another authority was also cited before me In Public Prosecutor v. Syed Rowther, 1961 Mad WN (Cr) 117 = (1962 (1) Cri LJ 45) Anantanarayan, J., (as he then was) found that the officers had forcibly entered into the private house of the first respondent and attempted to seize some note books merely on the allegation that they were accounts of the business. The learned Judge found that the records did not even show that the respondent had really carried on any business as dealer. It is seen from these two decisions that initially there is a total lack of jurisdiction on the part of these officers to act as they did in their official capacities. These two decisions are not helpful to the proposition of law submitted by Mr. Ramaswami. In my view, the conviction of the petitioner for an offence under Section 332, I. P. C. is correct and proper. There are no grounds for me to interfere with the conviction of the petitioner.

Mr. Ramaswami made an eloquent plea that in view of the status of the petitioner, the sentence of fine may be substituted for by admonition. Although one is disposed to take the stern view that a Municipal Councillor must exercise a greater sense of responsibility in his dealings with public servants who discharge their official duties in the interest of public service, I am inclined to think that the interests of justice would be served by admonishing the petitioner under Section 3(1) (sic) of the Probation of Offenders Act in view of the fact that the accused is a first offender. The fine amount may be directed to be returned to the petitioner. With this modification, this revision petition is dismissed.

Revision dismissed.

1970 CRI. L. J. 1239 (Vol. 76, C. N. 313) =

AIR 1970 MADRAS 360 (V 57 C 107)

KRISHNASWAMI REDDY, J.

**A. Gnanasikhamony, Petitioner Accused,
 v. Palukal Panchayat, Respondent**

**Criminal Revn. Case No 1190 of 1967
 and CrL. R. P. No 1176 of 1967, D/- 11-9-
 1969 against order of Spl. First Class
 Magistrate, Kazhithurai. D/- 20-9-1967.**

LM/EN/F864/69/TVN/D

Panchayats — Madras Panchayats Act (35 of 1958), S. 178(2) (xxii), R. 32 of the Rules and the Rule under Madras Notification No. 52 of G. O. Ms. No. 1248 dated 26-4-1961 — Money due under contract is not recoverable by distraint or prosecution.

Arrears of kist amount payable under contract by which contractor was given the right to collect fees from public market Panchayat cannot recover the amount by distraint or prosecution — Expression “other sums” in Rule does not include money due under contract — Panchayat has power to enter into contracts under Section 8(3), but sums due under them are not recoverable as sums due under the Act or Rules — Provisions of Section 387 of the Madras City Municipal Corporation Act and Section 344 of the Madras District Municipalities Act giving such power indicates that omission of such power from the Panchayat Act was deliberate ILR 26 Mad 475 & AIR 1924 Mad 669 & AIR 1924 Mad 898 (2) & AIR 1951 Trav-Co 82, Foll

(Paras 5, 6, 7 and 13)

Cases Referred: Chronological Paras

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|--|----|
| (1951) AIR 1951 Trav-Co 82 (V 38) | |
| = 52 Cri LJ 271, Ahemad Hydros v Always Municipality | 12 |
| (1924) AIR 1924 Mad 669 (V 11) = ILR 47 Mad 381, Punia Syamalo In re | 10 |
| (1924) AIR 1924 Mad 898 (2) (V 11) = 84 Ind Cas 325 = 26 Cri LJ 261, Mahabab Alli Khan v. President Taluk Board Kurnool | 11 |
| (1901) ILR 26 Mad 475 = 1 Weir 752, Abdul Azees Sahib v. Cuddapah Municipality | 9 |
| T. R. Ramachandran and T. R. Rajagopalan, for Petitioner, S. Padmanabhan, for Respondent; Addl P. P., for State; C. F. Louis (Amicus Curiae) | |

ORDER:— This petition has been filed by the accused in C. C. No. 15 of 1967 on the file of the Special First Class Magistrate, Kuzhithurai, against the order of the said Magistrate in overruling the preliminary objection raised by him on the ground that the complaint against him was incompetent as there was no procedure laid down in Madras Panchayat Act for the recovery of the amount due from him under the contract by way of distraint or prosecution

2. It is necessary to note the facts very briefly for the purpose of appreciating the point raised by the petitioners. The right of collecting fees from Kannumamood public market in Palukal Panchayat was leased out to the petitioner by the Executive Officer, Palukal Panchayat, and a written agreement was entered into between the Executive officer of the Panchayat on one part and the petitioner on the other on 7th April 1966 by which the

petitioner had to pay to the panchayat the kist amount in ten monthly instalments at Rs. 1,370 50 and the first instalment was to be paid on 31-1-1967.

The petitioner defaulted to pay the instalments and had fallen in arrears to the tune of Rs 6,320/-. The Executive Officer therefore, filed a complaint before the Special First Class Magistrate, Kuzhithurai alleging that the petitioner had wilfully omitted to remit the market lease amount of Rs 6,320/- due to Palukal Panchayat for the year 1966-67 in respect of lease contract of the Kannumamood Market. It was alleged in the complaint that the petitioner wilfully prevented distraint. The complaint was instituted under Cl. 22 of Sub-section (2) of S. 178 of the Madras Panchayats Act and violation of condition as per para 3 of the agreement executed by the petitioner on 7-4-1966, and also under Notification No 52 of G. O. Ms No 1248 dated 26-4-1961

3. The petitioner raised an objection in the lower Court that the amount due under the contract cannot be recovered in the manner provided in Notification No 52 of G. O. Ms. No 1248 dated 25-4-1961 and that, therefore, the prosecution was not maintainable. The learned Magistrate by his Order dated 20-9-1967 overruled his objection by stating that the Panchayat Rules did not mention about any contracting party, but it simply says that any sum due to the Panchayat under the Panchayat Act should be recovered by a suit and ultimately held that he can take cognizance of the offence and proceed with the trial.

4. I sought the assistance of Mr C F Louis, Advocate, to assist the Court as the point involved in this case may in the larger interest affect the rights of parties. The question which has to be considered is whether the Panchayat has got any right to prosecute a person for his failure to pay the Panchayat any amount which he agreed to pay as per the agreement entered into between him and the Panchayat. It therefore, becomes necessary to note the relevant provisions of the Madras Panchayats Act, 1958 (hereinafter called ‘the Act’). The power to enter into contract is provided under Section 8 sub-section (3) of the Act which is as follows

“Every Panchayat shall be a body corporate by the name of the village or town specified in the notification issued under Section 3, shall have perpetual succession and a common seal, and, subject to any restriction or qualification imposed by or under this Act or any other law, shall be vested with the capacity of suing or being sued in its corporate name, of acquiring, holding and transferring property, movable or immovable, of entering into contracts and of doing all things necessary, proper or expedient for the purpose for which it is constituted.”

Sub-section (2) of Section 99 of the Act relates to levy of fees in a public market Sub-section (2) of S. 99 runs thus:

"Subject to such rules as may be prescribed, the Panchayat.....may after obtaining the previous written permission of the Inspector, levy any one or more of the following fees in any public market at such rates, not exceeding the maximum rates if any "prescribed in that behalf as the panchayat may think fit"

Section 176 of the Act confers power on the Panchayat to farm out collection of fees. It runs thus —

"No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any tax or other sum due to a panchayat or panchayat union council under this Act or any rule, by-law, regulation or order made under it after the expiration of a period of "three years from the date on which distraint might first have been made, a suit might first have been instituted, or prosecution might first have been commenced as the case may be, in respect of such tax or sum"

Under Section 178(2) (xxii) it is provided as follows:

"The Government shall, in addition to the rule-making powers, conferred on them by any other provisions contained in this Act, have power to make rules generally to carry out the purposes of the Act

(2) In particular, and without prejudice to the generality of the foregoing power, the Government may make rules—

... ..
(xxii) as to the realisation of any tax or other sum due to a panchayat or panchayat union council under this Act or any other law or any rules or by-laws, whether by distraint and sale of movable property, by prosecution before a Magistrate, by a suit, or otherwise."

Under this rule-making power, the Governor of Madras by Notification No. 4 framed rules in respect of assessments and collection of taxes. Rule 24 relates to mode of collection of taxes. Rule 25 relates to distraint and sale of movable property and Rule 25(2) provides for prosecution, if for any reason the distraint or a sufficient distraint of the defaulter's property is impracticable and Rule 32 provides for imposition of fine.

The relevant Rule 32 with which we are now concerned is the Rule relating to the recovery of sums due to the Panchayat other than the taxes, as we are now concerned with the amount due under the contract. In Notification No 52, the Rule provides as follows:—

"Recovery of sums due to the panchayat. All costs, damages, compensation, penalties, charges, fees (other than school fees), expenses, rents (not being rents for land

and buildings demised by the Panchayat) contributions and other sums which under the Madras Panchayats Act, 1958, or any other law or rules or by-laws made thereunder are due by any person to the Panchayat may, if there is no special provision in the Act or the rules made thereunder for their recovery, be demanded by bills which shall be served on the persons concerned and recovered in the manner provided in the rules for the collection of taxes under the Madras Panchayats Act, 1958."

This Rule provides that the amounts due under the various heads specified therein could be recovered in the manner provided under the rules for the collection of taxes, namely, by distraint and if distraint becomes impracticable, by prosecution.

5. Now, the question is whether this rule includes the amount due to the Panchayat under a contract between the Panchayat and the third party under any of the heads mentioned therein. It is clear that the specific heads provided therein, namely, costs, damages, compensation, penalties, charges, fees, expenses, rents and contributions would not cover the amounts due under the contract. But the Rule includes "other sums" also. Can it be said that the amount due under the contract would come within the item of 'other sums'? It is very significant to note that the Rule does not take in whatever amount due to the Panchayat but limits to the amount due to the Panchayat under law or rules or by-laws made thereunder. The amount due under the contract may be an amount due to the Panchayat but it cannot be said that the said amount is due under the Panchayats Act, or any of the Rules framed thereunder. The Rule does not include specifically the amount due under the contract. In the absence of such a specific provision and with a limitation to the sums due under the Act or any other law or rules or by laws made thereunder, it is clear that the amount due under a contract to the Panchayat is excluded within the purview of this Rule. Otherwise, when a power was conferred on the Panchayat to enter into contract by virtue of sub-section (3) to Section 8 of the Act, the Notification could have included specifically the amount due under the contract also under this Rule. It is, therefore, evident that the intention was to exclude it within the purview of this rule.

6. In this context, it is worthwhile to note the similar provisions contained in other Acts. Section 387 of the Madras City Municipal Corporation Act, 1919 runs thus:

"Recovery of sums due as taxes—
All costs, damages, penalties, compensations, charges, fees, rents, expenses, contributions, and other sums which under this Act or any rule, by-law or regula-

tion made thereunder or any other law or under any contract including contract in respect of water-supply or drainage made in accordance with this Act, and the rules, by-laws and regulations are due by any person to the Corporation shall, if there is no special provision in this Act for their recovery, be demanded by bill containing particulars, of the demand and notice of the liability incurred in default of payment and may be recovered in the manner provided by rules 21 and 28 of the rules contained under Part VI of Schedule IV....."

Rules 21, 28 and 29 of Schedule IV to the said Act contain similar rules as in Notification 52 of the Panchayat Act providing for distraint and prosecution. This section specifically includes in spite of other sums due under the Act or any rule, by-law or regulation made thereunder, the amount due under any contract including a contract in respect of water-supply or drainage made in accordance with this Act and the amount due to the Corporation. The amounts due under the contract are significantly omitted in Notification No 52 which is under consideration,

Similarly, Section 344 of the Madras District Municipalities Act, 1920 are in pari materia with S 387 of the Madras City Municipal Corporation Act, 1919, with the exception that this Section does not include all contracts as provided under Section 387 of the former but includes only the amount due under a contract in respect of water-supply or drainage made in accordance with the Act, rules or by-laws made thereunder. This section also includes the sums due under the contract mentioned therein besides the other sums due. In this Act, also, there are provisions which are similar to the provisions in the Madras Panchayats Act in respect of the mode of recovery by distraint and by prosecution. It is therefore, clear from the provisions of these Acts that wherever the Legislature intended to include the amount due under the contract also to be recovered by the mode of distraint and prosecution, it specifically said so. When there is an omission in the Panchayat Act, the omission must be taken to be a deliberate one and that the Legislature did not intend to include the amount due on the contract.

7. It is significant to note that the Rules framed under the Madras District Boards Act, 1920 and the Madras Village Panchayats Act 1950 are in pari materia with the rules under consideration. The sums due under the contract were not included in these rules. It, therefore, appears that though the Legislature has given power to the Corporation and the District Municipalities to recover the amount due under the contract by following the modes of distraint and prosecution for recovery,

yet, in its wisdom, it did not want to confer such power to the District Board, Village Panchayat, Town Panchayat or Panchayat Union to collect any amount due to the Panchayat under a contract. The Legislature then passed the Madras Panchayats Act, 1958 and the Government framed the Rules thereunder, and followed the pattern provided under the Madras District Boards Act and the Madras Village Panchayats Act though they would have been aware of the provisions of the Madras City Municipal Corporation Act and the Madras District Municipalities Act. It is not necessary to go into the motives of the Legislature of the Government for not following the pattern provided under the Municipal Corporation Act, 1919 and the District Municipalities Act, 1920. The absence of the words "Sums due under any contract to the Panchayat" in the Rules is very significant. It shows that a Panchayat cannot prosecute a person who committed default in respect of payments due under the contract to the Panchayat.

8. In the following decisions in respect of the provisions of the District Municipalities Act, 1920, and the Local Boards Act, 1920, it has been held that the words "other sums" used in the provisions of the said Acts will not include the amount due under the contract.

9. In *Abdul Azees Sahib v Cuddapah Municipality*, (1901) ILR 26 Mad 475 Sir Arnold White, C J held that "money due under a contract entered into with a Municipality for the right to collect tolls in consideration of a money payment does not fall within any of the provisions of Section 269 of the District Municipalities Act, 1884 and a contractor who fails to pay what is due under such a contract cannot be convicted and fined under that Section 269 of the District Municipalities Act, 1884 is in pari materia with Section 344 of the District Municipalities Act, 1920.

10. In *Punia Syamalo' In re*, ILR 47 Mad 381 = (AIR 1924 Mad 669) referring to the words used under Sec 221 of the Madras Local Boards Act, 1920, the Court held that the words "other sums" in that section should be read ejusdem generis with the words preceding therein. The Division Bench found that the amount due under a contract of lease though of the toll cannot be treated as falling within the words of Section 221 of the Local Boards Act and that the sum in question was not payable "under or by virtue of this Act", but is payable under the contract between the parties.

11. In *Mahabab Ali Khan v. President, Taluk Board Kurnool*, 84 Ind Cas 325 = (AIR 1924 Mad 898(2)) the Division Bench held that money due to a Municipality under a contract cannot be summarily recovered by the Municipality.

under Section 221 of the Madras Local Boards Act of 1920.

12. In *Ahemad Hydros v. Always Municipality*, 52 Cri LJ 271 = (AIR 1951 Trav-Co 82) the Travancore-Cochin High Court, in dealing with Section 365 of the Travancore District Municipalities Act which is in pari materia with Section 269 of the Madras District Municipalities Act held that the amount due under a contract for the collection of market cess will not come under any of the Municipal dues and the prosecution of the Contractor was unsustainable.

13. Thus, it is seen that the Courts have uniformly taken the view that the words "other sums" due under the Act could not be equated with the amount due under the contract. In the result I find that the Special First Class Magistrate had no jurisdiction to entertain the complaint and the proceedings before him are quashed. The petition is allowed.

14. Before taking leave of this case, I am bound to express my gratitude to Mr. C F. Louis, Advocate, who rendered valuable assistance to the Court by making submissions after having carefully made a research of all the relevant Acts and provisions and the case law on the subject.

Petition allowed.

1970 CRI. L. J. 1245 (Vol. 76, C. N. 315) =

AIR 1970 PATNA 293 (V 57 C 47)

SHAMBHU PRASAD SINGH, J.

Purshottam Ram Agarwal and others, Petitioners v. State, Opposite Party.

Criminal Revn Nos. 39 and 43 of 1969, D/- 26-8-1969, against order of Sub Divnl. Magistrate, Muzaffarpur, D/- 9-10-1968

(A) Criminal P. C. (1898), S. 117 (1) and (3) and S. 107 — No action under sub-s. (3) before enquiry under sub-s. (1) — Effect.

No action under section 117 (3) can be taken before an enquiry under sub-s. (1) of that Section has started and such an enquiry cannot start unless the persons against whom a proceeding under S 107 has been drawn up have appeared before the Court. (Para 3)

(B) Criminal P. C. (1898), S. 117 (3) — Initial order itself illegal — Order under sub-s. (3) must also be set aside.

(Para 3)

(C) Criminal P. C. (1898), S. 107 — Petitioners opening daily market near Government market — Interference by Thikedars of Govt. with free choice of shop keepers — Magistrate should have drawn proceeding under S. 107 against Thikedars rather than against petitioners.

(Para 4)

J. N. Verma, Dindyal Sinha and Suresh Chandra Pd Sinha, for Petitioners; Chhatrapati Kumar Sinha, for State.

ORDER: These two applications in revision arise out of the same proceeding under Section 107 of the Code of Criminal Procedure (hereafter to be referred as 'the Code' hence they have been heard together and are being disposed of by a common judgment Criminal Revision No. 43 of 1969 is by twelve members of the second party to the proceeding and is directed against an order dated the 8th October 1968. Criminal Revision No. 39 of 1969 is by four other members of the second party to the same proceeding and is directed against an order dated the 9th October 1968.

2. It appears that the Circle Officer, Sahebganj Achal in the district of Muzaffarpur sent to the Sub-Divisional Magistrate, Sadar Muzaffarpur a letter dated the 30th September, 1968, stating that petitioners 1 and 2 of Criminal Revision No. 34 of 1969, and their father, Shankar Prasad Agarwal were going to open a daily market with effect from the 1st of October 1968, at a distance of hardly 1/4th of a furlong from the Hawalgani Nawanagar Kothia Bazar of the Government and that if they were allowed to open a daily market, the Government market would be totally finished resulting in a loss of five to six thousand rupees per annum to the Government. The Circle Officer, accordingly, requested the Sub-divisional Magistrate to take immediate necessary action so that the Government market may not be hampered, and to issue direction to the Officer-in-charge Sahebganj Police Station to stop the opening of the said market from the 1st of October, 1968 till the final decision (of the Sub-divisional Magistrate). The Sub-divisional Magistrate was also requested to take immediate action under section 107/144 of the Code.

On receipt of this letter, which has been made Annexure '1' to the petition the Sub-divisional Magistrate registered case no 866 of 1968, under section 144 of the Code and directed the police to take action under section 151/107 of the Code. That order is not before me but the substance of it has been mentioned in the impugned order dated the 8th October, 1968. It is not quite clear that when a proceeding was drawn up under S. 144 and not under section 107 of the Code, how could the Sub-divisional Magistrate ask the police to take action under section 107 of the Code. On the 5th of October, 1968, the Circle Officer, Sahebganj, sent a letter (Annexure '2' to the petition) to the Officer-in-charge Sahebganj Police Station stating therein that in spite of imposition of an order under section 144 of the Code, the market has

been started on the 1st of October 1968, and that the party concerned were ready to take law into their own hands forcibly against the Government employees. He requested the Officer-in-charge to make over to him a copy of the report which was going to be submitted to the Subdivisional Magistrate. It was also pointed out in the letter that the incident created by the party by holding a parallel market against the open defiance of the Government orders proved that there was no law and order in the Sahebganj Market. He also forwarded a copy of this letter to the Subdivisional Magistrate.

On the 8th October, 1968, the Subdivisional Magistrate drew up a proceeding under section 107 of the Code against the petitioners of Criminal revision no 43 of 1969. Perhaps it was drawn on the basis of Annexure '2' to the petition, but there is nothing in the order itself to indicate what materials other than the letter of the Circle Inspector dated the 30th September, 1968, he had before him to justify starting of a proceeding under S 107 of the Code. By the same order he also issued notices to the petitioners of Criminal Revision No 43 of 1969 calling upon them to show cause as to why they should not be ordered to execute ad interim bonds of Rs 2000/- with two sureties of like amount each under section 117 (3) of the Code. On the 9th of October, 1968, he received a report of the Officer-in-charge Sahebganj Police Station and drew up a proceeding under section 107 of the Code against the petitioners of Criminal Revision no 39 of 1969. He also sent notices to them under section 116 (3) of the Code. In the police report it is stated that the Thikedars of the Government market were requesting the Shopkeepers not to go to the newly started market of petitioners 1 and 2 of Criminal Revision No 43 of 1969, on which some of the petitioners retorted them and became prepared even to assault them. After this the situation became tense and there was likelihood of a breach of the peace.

3. Mr J. N Verma for the petitioners has contended that unless the petitioners had appeared in an enquiry as contemplated under section 117 (1) of the Code, the Subdivisional Magistrate could not have issued notices under section 117 (3) of the Code. It is now well established that no action under section 117 (3) of the Code can be taken before an enquiry under sub-section (1) of that Section has started and that such an enquiry cannot start unless the persons against whom a proceeding under section 107 of the Code has been drawn up have appeared before the Court. Mr C K Sinha appearing on behalf of the State has frankly conceded that this part of the order of the Magistrate was wrong, but has contended that

the Magistrate has also passed another order for execution of bonds under section 117 (3) of the Code on the 2nd of November, 1968, after the petitioners appeared before him and they have executed the bonds. In the circumstances he has submitted that even if the issue of show cause notices for action under section 117 (3) of the Code by orders dated the 8th and 9th of October, 1968, be wrong, they should not be set aside by this court in exercise of revisional powers. It is not, however, necessary to decide this question as Mr. Verma has also attacked the drawing up of the proceeding itself and is going to succeed on that point. If the initial order itself is illegal, the order under section 117 (3) of the Code must also be set aside.

4. The contention of Mr. Verma is that the materials before the Subdivisional Magistrate did not justify drawing up a proceeding under section 107 of the Code. He has submitted that every citizen of the country has got fundamental right as guaranteed by Article 19 of the Constitution of India to carry on any trade and business and neither the Circle Officer was right in asking the Subdivisional Magistrate not to allow some of the petitioners to open a market of their own near the Government market as that would diminish the income of the Government, nor the Subdivisional Magistrate was right in starting a proceeding under S 144 or under section 107 of the Code against the petitioners on that basis. There is nothing in the letter of the Circle Officer dated the 30th September, 1968, that the petitioners were likely to break the peace. Even in his letter dated the 5th October, 1968, to the Officer-in-charge Sahebganj Police Station he did not allege that the petitioners had really committed any act likely to cause a breach of the peace. He merely stated that it was reported to him that they were ready to take law into their own hands forcibly against the Government employees.

In the police report also there is nothing to indicate that the petitioners took the initiative and on that account there was an apprehension of a breach of the peace. Only when the Thikedars of the Government market started interfering with the free choice of the shopkeepers either to go to the newly established market of some of the petitioners or to the Government market, the trouble started. Mr Sinha has urged that the Thikedars had every right to request the shopkeepers peacefully not to go to the newly started market, but to the Government market. That may be so, but the police report read as a whole indicates that the Thikedars of the Government market went near the newly started mar-

ket and started canvassing to the shopkeepers not to go to the new market, but to the Government market. In the circumstances, if some of the petitioners abused them, it cannot be said that they were responsible for a breach of the peace. Really it was the Thikedars of the Government market whose action was responsible.

In the circumstances, the Subdivisional Magistrate rather should have drawn up a proceeding under section 107 of the Code against the Thikedars of the Government market and those Government employees who were supporting them and thus interfering with the exercise of the fundamental right of the petitioners of carrying on trade and business. The two impugned orders of the Sub-divisional Magistrate drawing up of the proceedings under section 107 of the Code against the petitioners as well the consequential order for execution of interim bonds by the petitioners under section 117 (3) of the Code have to be quashed.

5. Before closing the judgment, I would like to observe that this case provides an instance justifying that sooner, the executive and judicial powers even in respect of preventive matters, such as proceedings under Ss. 144, 107 and 145 of the Code are completely separated, the better. Really the Subdivisional Magistrates are not to be blamed because in the changed circumstances they have to look after the rights of State in the Government property, and at the same time carry out judicial functions and there is bound to be conflict between the two. It is really the system which is to be blamed. However so long separation does not take place, they have to act in such a way that their judicial orders are not called improper.

6. In the result the applications are allowed and the orders dated the 8th and the 9th of October 1968, are quashed. If there be an apprehension of a breach of the peace in future, it will be open to the Subdivisional Magistrate to start a fresh proceeding under section 107 of the Code, but not in such a manner as to interfere with the fundamental rights of the petitioners. Before starting proceeding he should satisfy himself as to who is really at fault; whether the petitioners or the Government Thikedars and employees. Applications allowed.

1970 CRI. L. J. 1245 (Vol. 76, C. N. 315) =

AIR 1970 PATNA 303 (V 57 C 49)

R. J. BAHADUR AND B. P. SINHA, JJ
Sohan Manjhi, Appellant v. State, Respondent.

Criminal Appeal No. 281 of 1967, D/-
22-5-1969

LM/CN/G266/69/HGP/C

(A) Penal Code (1860), S. 85 — Intoxication when no excuse — Absence of any material to show that accused was under influence of liquor at the time he committed murder — Section 85 will not protect him. (Para 14)

(B) Penal Code (1860), S. 300 (thirdly), — Intention to murder when can be inferred — Assault with dunda breaking ribs of both sides, perforating pleura and lacerating lung of deceased — These injuries are sufficient in ordinary course of nature to cause death — Intention to cause death could be inferred — Offence fell under S. 300 (thirdly). (Para 15)

Rajeshwar Yajnik, (Amicus Curiae), for Appellant; Brishketu Sharan Sinha, for State

B. P. SINHA, J.:— Appellant Sohan Manjhi stands convicted and sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code for causing the death of Kutlu Sikalkar. He was a snake-charmer by profession.

2. The prosecution case was that Kutlu Sikalkar along with his wife Surpi Sikalkar (P. W. 8) and three small children had come to village Heven, Police Station Nimdih in the district of Singhbhum on a Thursday before the date of occurrence for the purpose of begging by showing snake charming performance. On 11-5-1965, which was a Tuesday, in the morning, Sohan Manjhi took Kutlu Sikalkar, his wife and children to his house and gave them 'Handia' (liquor) to drink. While they were drinking 'Handia', Sohan Manjhi proposed that one daughter of the victim should cultivate friendship with his daughter. He further proposed that he would keep the wife of the victim with himself. Kutlu Sikalkar told his wife Surpi Sikalkar (P. W. 8), "Sohan Manjhi wants to keep you." On this, Surpi Sikalkar replied that Sohan Manjhi was neither his casteman nor relation and, as such, who he was to keep her. After taking 'Handia', Kutlu Sikalkar along with his family members came back to the mango tree where they were living. Sohan Manjhi also came following them with a small dunda about two cubits in length. Without speaking anything, Sohan Manjhi gave dunda blows to Kutlu Sikalkar which hit him on the right side of the head and other parts of the body. Hulla was raised. Several persons arrived and witnessed the occurrence. As a result of the injuries received, Kutlu Sikalkar died at the spot. Surpi Sikalkar informed the Mukhia and the Chaukidar who came and saw the dead body. Mukhia Madan Manjhi (P. W. 9) sent Surpi Sikalkar along with the Chaukidar to Nimdih Police Station, where her fardbeyan was recorded that very day at about 4 p. m. by the Officer-in-charge Bharat Dasandh.

(P. W. 11). On the basis of that fardbeyan, formal F. I R was drawn up at Chandil Police station. The Officer-in-charge (P. W. 11) started for the place of occurrence reaching there at 8-30 p. m. He held inquest on the dead body and sent it for post-mortem examination. He examined witnesses and after completing investigation, submitted chargesheet against this appellant who was put on trial.

3. The defence was that the accused did not commit any offence and that he was falsely implicated at the instance of other persons.

4. The learned Additional Sessions Judge found the prosecution case well proved and, consequently, convicted and sentenced the accused, as mentioned above.

5. This appeal has been filed from Jail and Mr. Rajeshwar Yajnik has appeared as Amicus Curiae.

6. The fact that Kutlu Sikalkar died as a result of the injuries sustained by him on 11-5-1965 in the morning in village Heven has not been challenged and it is proved by the testimony of the witnesses who have figured as eye witnesses to the occurrence. The Officer-in-charge (P. W. 11) on reaching the place of occurrence saw the dead body of Kutlu Sikalkar with injuries thereon. On post-mortem examination, the doctor Debendra Jha (P. W. 2) on dissection found ante mortem wounds on the dead body. There were fractures of the ribs on both sides. Pleura was perforated by the ribs and the lung was lacerated. The doctor opined that the death was caused by the fracture of the ribs which was sufficient in the ordinary course of nature to cause death. He was further of the opinion that the injuries could be caused by lathi. As the body was in a state of decomposition, the doctor could not detect marks of other injuries on the skin. He has stated that the death took place within 48 hours of the time of post-mortem examination which fits in with the time of occurrence, as stated by the witnesses for the prosecution. Thus, there cannot be any doubt that Kutlu Sikalkar was assaulted on 11-5-1965 in village Heven with the blunt weapon like lathi as a result of which he died on the spot.

7. The next question that requires consideration is whether the prosecution has succeeded in proving that it was this appellant who was responsible for causing those injuries which resulted in the death of Kutlu Sikalkar. The prosecution has examined four persons as eye witnesses to the occurrence. They are Sukhu Manjhi (P. W. 1), Debendra Jha (P. W. 2), Parbati Manjhain (P. W. 3) and Mangli Manjhain (P. W. 4). All these witnesses have consistently spoken that they saw the appellant assaulting Kutlu Sikalkar with dunta. [After discussing the evidence of prosecution witnesses their Lordships proceeded]

8-13. On a consideration of the entire evidence, I have no doubt in holding that it was this appellant who had assaulted Kutlu Sikalkar on 11-5-1965 in the morning with dunta which resulted in his death at the spot.

14. Learned counsel for the appellant has argued that, at any rate, the appellant is protected by the general exception provided under Sections 85 and 86 of the Indian Penal Code. This argument has been advanced on the ground that the appellant had taken liquor and, therefore, if under the influence of that liquor, he did any act, he is protected by these Sections. There is no force in this contention. There is no material on the record to show that the appellant was under the influence of liquor at the time he committed the offence and no suggestion to this effect was made to any of the witnesses during their cross-examination. The appellant himself has not said anything in this connection in his statement under Section 342 of the Code of Criminal Procedure. Therefore, there is no basis for this submission. This contention is, therefore, rejected.

15. Lastly, it has been submitted that at any rate, the offence committed would come under Section 304 of the Indian Penal Code and not under Section 302. There is no force in this contention as the appellant had assaulted Kutlu Sikalkar with dunta in such a way that the ribs of both sides were broken, as a result of which the pleura was perforated and the lung was lacerated. The doctor has opined that the injuries were sufficient in the ordinary course of nature to cause the death. In view of the evidence on record, it must be held that the appellant intended to cause such bodily injury which was sufficient in the ordinary course of nature to cause death. That being so, the offence is murder under Section 300 (thirdly).

16. The result is that the appeal is dismissed and the conviction and sentence passed on the appellant are affirmed.

17. BAHADUR, J.: I agree.

Appeal dismissed

1970 CRI. L. J. 1246 (Vol. 76, C. N. 316) =

AIR 1970 MYSORE 218 (V 57 C 56)

A R SOMNATH IYER, J

Gulam Ibrahim and others, Petitioners
v Basheer Ahmed, Respondent

Criminal Revn Petn No 158 of 1968,
D/-17-2-1969, against order of S J
Gulbarga, D/-1-2-1968

LM/LM/G207/69/TVN/Z

Penal Code (1860), Ss. 482, 483 and 486 — Offences under Penal Code sections — Period of limitation prescribed under Section 92 of Trade and Merchandise Marks Act does not apply — That provision concerns prosecutions for offences under that special law — (Trade and Merchandise Marks Act (1958), S. 92). (Para 2)

Muralidhar Rao, for Petitioners; Manohar Rao Jahagirdar, for Respondent.

ORDER:— The order of the Magistrate who dismissed the complaint on the ground that it was a time barred prosecution was reversed by the Court of Session on the ground that the period of limitation applicable to the prosecution was that prescribed by Section 92 of the Trade and Merchandise Marks Act, 1958, and not that prescribed by Section 15 of the Merchandise Marks Act, 1889 which was repealed. The petitioner who is the accused makes complaint that there was a misapplication of Section 92 of the 1958 Act, and that the prosecution was really governed by the provisions of the repealed Act.

2. It is clear that both the Magistrate and the Court of Session overlooked the fact that the offences with which the accused was charged are those said to have been committed under Sections 482, 483 and 486 of the Penal Code, whereas the period of limitation to which Section 92 of the 1958 Act and that to which the repealed Act refers, do not refer to prosecutions in respect of offences punishable under the Penal Code and prescribe a period of limitation for a prosecution for offences committed under those special laws.

3. That being so, the view taken by the Court of Session is unexceptionable, although the process by which it reached that conclusion is unsupportable.

4. Mr. Muralidhar Rao appearing for the petitioner however, contended that the Court of Session had no jurisdiction to set aside the order of discharge made by the Magistrate, and that all that it could have done was to make a reference to this Court. This argument cannot be of assistance to Mr. Muralidhar Rao for the reason that, if it is otherwise acceptable, I can set aside the order of the Magistrate in the exercise of my revisional jurisdiction.

5. Mr. Muralidhar Rao contends that having regard to the language of Sections 482, 483 and 486 of the Penal Code, as those sections stood amended at the relevant point of time, the prosecutions are unsustainable. But, into that question, no investigation has so far been made by any one, and if the petitioner is so advised he is at liberty to advance that contention before the Magistrate even now.

6. With these observations I dismiss this revision petition.

Petition dismissed.

1970 CRI. L. J. 1247 (Vol. 76, C. N. 317) =

AIR 1970 PATNA 311 (V 57 C 51)

M. P. VARMA, J.

Nageshwar Pd., Petitioner v. State of Bihar, Respondent

Criminal Revn. No. 757 of 1968, D/- 15-5-1969, against order of 2nd Addl. S. J. Patna, D/- 11-9-1967.

(A) Penal Code (1860), S. 467 — Failure of prosecution to establish that accused made forgery or interpolations in Tax receipts — No adverse inference to impute motive to commit offence under S. 409 can be drawn, against him. (Para 2)

(B) Penal Code (1860), S. 409 — Criminal breach of trust — Criminal or dishonest misappropriation is essential — Mere retention of money not enough. AIR 1953 SC 478; AIR 1933 Cal 800; 1961 (1) Cri LJ 654 (Guj), Rel. on. (Para 3)

(C) Penal Code (1860), S. 409 — Dishonest intention — No rule regarding depositing collections within specified period — Accused retaining money for 15 days and depositing at once when demanded — Accused's security deposit with office more than amount misappropriated — Enmity between accused and his officers — Case held of carelessness and not dishonest intention. (Paras 3 to 6)

Cases Referred: Chronological Paras

(1961) 1961 (1) Cri LJ 654 (Guj),

Desai Champaklal Nemchand v.

The State

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(1953) AIR 1953 SC 478 (V 40) =

1954 Cri LJ 102, Chelloor Manknal

Narayan Ittirvi Nambudiri v. State

of Travancore Cochin

4

(1933) AIR 1933 Cal 800 (V 20) =

35 Cri LJ 156, Major Robert

Stuart Wauchope v. Emperor

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S. N. Mishra, Kamta Pd. & P. K. Joshi, for Petitioner; Manindra Nath Varma, for State.

ORDER:— The sole petitioner of this case has been guilty for an offence under Section 409 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three months. He was also charged under Section 467 of the Code but was acquitted of that charge.

2. The following few facts may be briefly stated in order to appreciate the point, which has been argued before me. The petitioner was working as an office clerk in the Dinapore Nizamat Municipality and during the absence of a tax he did his work also in addition to his

CN/DN/B258/70/MNT/C

duties. The prosecution case is that he collected Rs 123 58 paise during the period from 11-6-62 to 3-7-62, which was further extended upto 20-7-1962. The tax collected by the petitioner was not deposited with the cashier of the municipality but he kept amount as well as counter foil receipt books, under which the collection was made, at his house. The Municipal Chairman asked him on 20-7-1962 as to where the counter foils of the receipts were. The petitioner informed him that they were at his house. He ordered him to bring them and the petitioner brought them. Then he was further asked as to where the amount was which he had collected under those eight receipts. The petitioner gave out that the amount was at his house and he would go and fetch the same. This he did on that very day and the money was deposited in the account of the municipality. Later on 24-7-1962 another Assistant Tax Daroga made a report (Ext 7) about the interpolation in the receipts, which had been issued by this petitioner. The matter was enquired into and the Chairman of the Municipality lodged F. I. R. in this case on 30-7-1962. There was enquiry by the police and charge sheet was submitted against this petitioner. He was first tried, after commitment, by the 1st Assistant Sessions Judge of Patna, who convicted him and sentenced him to three months' rigorous imprisonment under Section 409, Penal Code. Against this order of conviction there was an appeal which was heard by the learned 2nd Additional Sessions Judge of Patna, who confirmed the order of conviction and sentence. This revision is against the order of the learned Additional Sessions Judge.

3. Learned counsel for the petitioner, Mr S N Mishra, has raised only legal points before me. His first contention is that the learned Court was not justified, after giving a finding of acquittal under the charge of forgery, to raise a presumption against the petitioner for his conviction under Section 409, Penal Code, relying on some interpolations in the receipts. In my opinion, this argument is well founded, when the prosecution failed to establish that the petitioner had made forgery or interpolations in those receipts, even after the examination of a handwriting expert, I do not think that any such adverse inference should have been drawn by the learned Judge so as to impute a motive to the petitioner for committing an offence under Section 409, Penal Code. Any way, this remark of the Court below would not weigh much because I find that the second point, raised by learned counsel, would secure acquittal of his client. He has argued that accepting the facts of the case at their face value no offence under Section 409, I. P. C., had been made

out. For a criminal breach of trust by a public servant it is necessary that the public servant should commit criminal misappropriation or dishonest misappropriation because in the definition of criminal breach of trust, which is contained in Section 405 of the Code, it is given out that whoever being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property etc etc shall be said to commit criminal breach of trust. In this case the evidence shows that the collected money had not been misappropriated or converted to the use of the petitioner. He was ready with the money when he was asked about it.

4. It has been held in several cases that mere retention of a property is not enough to show that the person, who had retained the same, had committed criminal breach of trust or criminal misappropriation. In the case of Chellor Manknal Narayan Ittirvi Nambudiri v. State of Travancore-Cochin, AIR 1953 SC 478 their Lordships observed while dealing with a case of like nature that the prosecution has to establish first of all that the accused was entrusted with some property and it has to be established further that in respect of that property so entrusted there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract. A similar case came up before the Gujarat High Court — vide the case of Desai Champaklal Nemchand v State, 1961 (1) Cri LJ 654 (Guj) where it was observed that temporary retention of money does not by itself amount to criminal breach of trust. It amounts to that offence only if from the fact of retention of property entrusted, the ingredient of dishonest misappropriation or conversion etc can be correctly inferred. Hence even if a person is required under rules to deposit the amount entrusted in the Treasury within a few days, the failure to do so will not by itself amount to the offence of criminal breach of trust unless it is proved that there was dishonest misappropriation. In an earlier case of Calcutta High Court a similar view was taken in the case of Major Robert Stuart Wauchope v Emperor, AIR 1933 Cal 800. It was observed therein that in cases of criminal misappropriation, the prosecution must always prove misappropriation. It is not enough if it proves that the accused had received the money. The onus of proof never shifts from prosecution.

5. In the instant case there is no dispute over the fact that the tax had been collected by the petitioner from eight persons under receipts and the collected money was at once given to the Chairman when demanded. His only offence, if I

am permitted to say so, lies in the fact that he did not deposit this money at once in the municipal account but he kept it at his house for some days, may be 10 to 15 days. The only rule, which requires immediate deposit of the collected money produced by the prosecution, is Ext. 10/1. In fact, it is not a municipal rule but an order passed by the Vice-Chairman of the Dinapore Nizamat Municipality on the joint petition filed by the tax collectors of the municipality to extend the time of their attendance to the municipal office from 2-30 p. m. to 4 p. m. The order of the vice-chairman dated 19-9-1959 is to the following effect:—

"Perused the petition. The T. Cs. may be informed to attend office daily for depositing collection money at 4 p. m. instead of 2-30 p. m."

A copy of this order was forwarded to all the tax collectors and tax Darogas of the Municipality. It is said on behalf of the petitioner that this order was issued in September, 1959, and he had joined the service in 1961 and this order was never brought to his notice. So clearly, it is not a rule that the collected money on a particular date should be deposited by the end of that very day. This order is vague to that extent. The tax Darogas had made a grievance that they should be allowed to come to office by 4 p. m. and deposit the collected money and this prayer was allowed. So, this order does not necessarily mean that the amount collected on a particular day had to be deposited by the end of that day. This document, in my opinion, has been misconstrued by the Courts below.

6. It was further pointed out to me that Kamta Pd (P. W. 9) who was in charge of collection of mutation fee, deposed to the effect that in some cases he deposited collected money after a lapse of 41 days. So, I do not find that this petitioner has violated any rule of law or any legal contract. On his behalf it is further stated that he had some enmity with the Assistant Tax Daroga, who made the report (Ext. 7) and also with the Chairman of the Municipality. Any way, this aspect of the matter need not be further discussed because after all the prosecution has to prove the ingredients of the offence beyond any reasonable doubt. It was further pointed out to me that when this petitioner joined municipal service in 1961, he deposited a cash security of Rs 300/- In view of this deposit it would have been sheer foolishness on his part to have dishonestly retained this lesser amount of Rs 123 58 which amount could have been easily deducted from his security money. In my opinion, it is not a case of dishonest intention but a case of carelessness or at best neglect of duty on the part of the petitioner. It has been observed in many cases that suspicion, however,

great, cannot take the place of legal evidence and a conviction cannot be based when the evidence is 'may be true' but only when the evidence is 'must be true'. So, when all these legal points and the evidence and the circumstances are taken into consideration, I do not think that the conviction of the petitioner is justified under Section 409, Indian Penal Code.

7. The result is that this revision succeeds and the order of conviction and the sentence passed against the petitioner is set aside.

Revision allowed

1970 CRI. L. J. 1249 (Vol. 76, C. N. 318)=

AIR 1970 PATNA 319 (V 57 C 55)

R. J. BAHADUR, J.

Gaya Datt Patha and another, Petitioners v. Narabdeswar Dubey, Opposite Party.

Criminal Revn No. 160 of 1969, D/- 22-7-1969, from order of Magistrate, 1st Class, Sasaram, D/- 6-11-1968.

Criminal P. C. (1898), S. 139-A — Procedure of enquiry where public right is denied — Provisions are mandatory — Ignoring earlier cause shown in denial of public right and relying on its not being shown again during later site inspection is illegal and vitiates consequential order for removal of alleged encroachment.

(Paras 3, 4)

Kumar Brajendra Nath, for Petitioners

ORDER:— This application in revision arises out of proceedings under Section 133 of the Code of Criminal Procedure

2. It appears that on 8-10-1966, the Subdivisional Magistrate, Sasaram, on perusal of a report submitted by the Sub-inspector of Police, Dawath Police Station, was of the view that there was an apprehension of breach of the peace between the parties, namely, Narabdeswar Dubey on the one hand (who is the opposite party here) and Gaya Pathak and others, on the other, (the petitioners here), in respect of Khata No 457, Plot No. 1921 of village Jogani. He ordered that proceedings be drawn up under Section 144 of the Code against both the parties and they were restrained from going to the land. It was further ordered to the parties to show cause by a certain date. It appears that after the matter was taken up on various dates, the proceeding was converted into S 133 of the Code of Criminal Procedure on 5-12-1966. Later, on the same date he drew up a proceeding under Section 133 of the Code against the members of the opposite party, namely, the present petitioners and required them to show cause by 27-12-1966 as to why

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the encroachment should not be removed. It appears that after a number of dates on 23-11-1967 the petitioners filed their show cause and the case was transferred to a Magistrate, First Class, for disposal. After the case was taken up and adjourned on various dates, ultimately on 6-11-1968 the Magistrate having held local inspection in presence of both the parties and their lawyers, ordered the second party, namely, the petitioners to remove the encroachment and further directed them to widen the existing road over the plot in question.

3. It is urged by learned counsel, appearing on behalf of the petitioners, that they had not only filed the show cause before the learned Magistrate, but had also filed various papers in assertion of their claim, namely, the denial of the existence of the public rights and any encroachment, as alleged, but the learned Magistrate did not proceed in accordance with the mandatory provisions as laid down in Section 139-A of the Code of Criminal Procedure. It has been pointed out that in the impugned order the learned Magistrate had observed that no evidence had been adduced by either of the parties which means at the time the learned Magistrate had held the local inspection. It is contended that even if no evidence had been led by either of the parties the Magistrate was clearly in error in not proceeding in accordance with law, as laid down under Section 139-A of the Code.

4. This application is not opposed on behalf of the opposite party. I have perused the entire order sheet of the learned Magistrate besides the impugned order. I am satisfied that the learned Magistrate was in error and has committed illegality which requires interference by this Court, though normally this Court is reluctant to interfere in a matter like this. It is not only a question of an irregularity of procedure, but the order is manifestly illegal and, therefore, cannot be sustained.

5. Accordingly, the order of the learned Magistrate dated 6-11-1968 is set aside and the application is allowed.

Application allowed.

1970 ORI. L. J. 1250 (Vol. 76, C. N. 319) =

AIR 1970 PATNA 320 (V 57 C 56)

N L UNTWALIA, J.

Bhola Mahton, Petitioner v. Bhattu Baitha, Opposite Party

Criminal Ref No 8 of 1969, D/- 23-7-1969, against order of 4th Addl S J., Monghyr, D/- 5-3-1969

CN/DN/B295/70/HGP/C

Criminal P. C. (1898), S. 147(2) Proviso — Dispute concerning right to flow water — Recording of finding about period of exercise is mandatory only when Magistrate first finds that such right exists — Party found exercising right to flow of eaves water on adjoining house for too short a period — Magistrate, therefore, holding that right was not established and passing order prohibiting party from exercising right — Order held was within jurisdiction. Case law ref.

(Paras 3, 4, 5)

Cases Referred: Chronological Paras

(1961) AIR 1961 Pat 374 (V 48) =	
1961 (2) Cri LJ 522, Chaturgun Turha v Jamadar Mian	4
(1960) 1960 BLJR 84 = (1960) 2 All LR (Cri) 127, Bhagwati Prasad v. L. N. Keshri	5
(1955) AIR 1955 Pat 265 (V 42) = 1955 Cri LJ 977, Trijogi Narain Singh v. Kamta Prasad	4
(1930) AIR 1930 Mad 865 (V 17) = 32 Cri LJ 215, Kanta Venkanna v. Inuganti Venkata Surya Nilladri Rao	5
(1924) AIR 1924 Pat 784 (V 11) = 25 Cri LJ 996, Sirkawal Singh v. Bhuja Singh	4
(1921) AIR 1921 Pat 486 (V 8) = 22 Cri LJ 463, Grant v. Padarath Jha	4
(1909) 10 Cri LJ 292 = 13 Cal WN 859, Srimanta Bera v Indra Narayan Prodhan	5

Prem Shankar Sahay and Rudradeo Prasad Sinha, for Petitioner, Pramod Singh, for Respondent

ORDER:— This is a reference under Section 438 of the Code of Criminal Procedure (hereinafter called 'the Code') by the 4th Additional Sessions Judge of Monghyr. It appears that under a misconception of law the learned Additional Sessions Judge has made this reference.

2. Bhola Mahton, on whose behalf Mr Prem Shankar Sahay has appeared in support of the reference, was the second party in a dispute under Sec 147 of the Code. Bhattu Baitha alias Malhu Baitha, on whose behalf the reference has been opposed, was the first party. The eastern half of plot No. 99, khata No 30, tauzi No 4900 of village Lagun, P. S. Muffassil, in the district of Monghyr, is the land of the first party on which stands his house. The western half was purchased by the second party by a kebala executed on the 22nd of June, 1957. The dispute relates to the flow and falling of water of the olti of the house of the second party on to the Chhapar of the first party. According to the case of the former, the eaves water of his house have been falling towards the east since long, even since before his purchase and he acquired a right in the nature of easement for the flow of the

water on and through the chhapar of the first party. The case of the first party has been that after his purchase Bhola Mahton has reconstructed the old existing room which existed on the eastern side of his house, made it double storeyed, raised and extended the chhapar and then the water started falling on the chhapar of the first party. The second party did it against the assurance given by him to the first party when he was reconstructing his house and making it double storeyed. The learned Magistrate on a consideration of the evidence of both sides held that Bhola Mahton after purchasing the house reconstructed it in mud a Do-Manjila and due to this new construction the water of the eaves of his chhapar began to fall on chhapar and wall of the house of the first party. The Magistrate, therefore, held that the second party has or had no right to flow his eaves water on the chhapar and wall of the first party and that his claim of right of easement is not established. The order of the learned Magistrate, therefore, is in accordance with sub-section (3) of Section 147 of the Code.

3. The learned Additional Sessions Judge seems to have overlooked that a finding in accordance with the proviso to sub-section (2) of Section 147 of the Code is necessary to be recorded only when in the first instance it is found by the Magistrate that a right as contemplated under sub-section (1) of Section 147 exists and he has to make an order prohibiting an interference with the exercise of such right. Thinking that without a finding one way or the other about the period specified in the proviso the order passed by the Magistrate becomes without jurisdiction, the learned Additional Sessions Judge has made the reference for setting aside the order of the Magistrate.

4. It is well settled so far this court is concerned that the requirement of the proviso to sub-section (2) of Section 147 of the Code is mandatory provided a declaration as to the existence of the right claimed by a party is made by the Magistrate: Vide *Grant v. Padarath Jha*, AIR 1921 Pat 486, *Sirkawal Singh v. Bhuja Singh*, AIR 1924 Pat 784, *Trijogi Narain Singh v. Kamta Prasad*, AIR 1955 Pat 265 and *Chaturgun Turha v. Jamadar Mian*, AIR 1961 Pat 374.

5. But there is no question of recording a finding in accordance with the proviso to sub-section (2) of Section 147 of the Code if the Magistrate be of the view that the right claimed by a party does not exist and then the Magistrate proceeds to make an order prohibiting an exercise of the alleged right. On the findings recorded by the Magistrate in this case, it is clear that the span of the period during which the eaves water from the chhapar of the second party

fell on the wall and the chhapar of the first party was too short to enable the Magistrate to declare the existence of such a right as claimed by the second party in his favour. He had purchased the house in the year 1957. The finding of the Magistrate was that after his purchase he reconstructed the house Do-Manjila and thereafter the eaves water of the chhapar started falling on the wall and chhapar of the house of the first party. The learned Magistrate seems to have believed the evidence of Ghughu Baitha in cross-examination when he said that Bhola demolished the entire old house and had constructed the pucca double storeyed building about 1½ years ago. Although it may not be necessary to establish the existence of the right claimed by a party under Section 147 of the Code for the entire requisite period of 20 years or more as observed by the Calcutta High Court in *Srimanta Bera v. Indra Narayan Prodhan*, (1909) 10 Cri LJ 292, it is clear that exercise of such a right for a short period is not sufficient to enable the Magistrate to make an order in accordance with sub-section (2) of Section 147 of the Code. In the cases referred to above, it would be found that the right was claimed or found to have been exercised for a long period or from time immemorial. That the period of exercise of such right must be long will appear from some of the observations made by a learned Single Judge of the Madras High Court in *Kanta Venkanna v. Inuganti Venkata Surya Neeladri Rao*, AIR 1930 Mad 865 and by a Bench of this Court of which I was a member in *Bhagwati Prasad v. L. N. Keshri*, 1960 BLJR 84. In *Bhagwati Prasad's* case, 1960 BLJR 84, *Sahai, J.* said at p. 87, column 1—

"..... It seems to me that the right referred to in that section is a legal right and not just bona fide claim of right. If the Magistrate finds, upon evidence adduced before him, that a party claiming the right has been exercising it for a long time — not permissively or otherwise but on assertion of the right of user — the Magistrate may, for the purpose of a proceeding under this section, presume, in the absence of anything to the contrary, that the party has a legal right to the user. He cannot raise any such presumption merely on the basis of circumstances which suggest the existence of a right, there must be positive evidence to show long user."

The passage extracted above does lend support to the view I have taken that the right claimed must be shown to have been exercised for a long time and not for a few years as has been found in this case by the learned Magistrate.

6. In the result, the reference is rejected and the rule is discharged.

Reference rejected.

1970 CRI. L. J. 1252 (Vol. 76, C. N. 320) =

AIR 1970 PATNA 332 (V 57 C 60)

B. D. SINGH, J

Mohammad Abbas and another, Petitioners v. Mohammad Mustaqim and others, Opposite Party.

Criminal Revn No 2177 of 1968, D/-29-7-1969, from order of Subdivisional Magistrate, Monghyr, D/-23-9-1968.

(A) Criminal P. C. (1898), S. 145 — Dispute regarding land — Apprehension about breach of peace essential to initiate proceeding under — Magistrate's order must show his satisfaction about existence of such apprehension. AIR 1968 SC 1444, Foll. (Paras 7 and 8)

(B) Civil P. C. (1908), S. 115 — Revision — High Court will interfere if order under S. 145, Criminal P. C. does not show existence of apprehension of breach of peace. AIR 1950 Pat 372, Disting. (Para 8)

(C) Criminal P. C. (1898), S. 145 — Dispute about land likely to cause breach of peace — Magistrate's order must show such apprehension — Mere mention in notice to parties is not enough. (Para 8) Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1444 (V 55) = 1969 Cri LJ 13, R H Bhutani v. Miss Mani J Desai 7, 8

(1962) AIR 1962 Pat 468 (V 49) = 1962 BLJR 267 = 1962 (2) Cri LJ 770, Shreedhar Thakur v. Kesho Sao 10

(1950) AIR 1950 Pat 372 (V 37) = 51 Cri LJ 1365, Wazir Mahton v. Badri Mahton 8

Devendra Narayan Sinha, for Petitioners, Prem Shankar Sahay, Rudradeo Kumar Sinha and Harendra Prasad, for Opposite Party

ORDER:— This application in revision has been preferred against the preliminary order of the Subdivisional Magistrate passed in a proceeding under Section 145 of the Code of Criminal Procedure (hereinafter referred to as 'the Code')

2. Petitioner No 1 is one of the members of the second party, and petitioner No 2 is one of the members of the third party, whereas opposite party Nos 1 to 3 are the members of the first party and opposite party Nos 4 to 14 are also members of the second party along with petitioner No 1. Opposite Party Nos 15 to 22 are the members of the third party and the remaining opposite party Nos 23 to 25 are the members of the fourth party in the said proceeding.

3. The dispute related to a land measuring 21 acres 95 decimals in various plots fully described in Schedules 1, 2 and 3 of the petition which has been filed in this Court

4. In order to appreciate the points involved in this application it will be necessary to state briefly the facts. Opposite Party Nos 1 to 3 filed a petition on 8-7-1968 in the Court of the Subdivisional Magistrate for drawing up a proceeding under Section 144 of the Code against the petitioners as well as other members of the second, third and fourth parties claiming 1/3rd share in the disputed land. The Subdivisional Magistrate after calling for the report drew up a proceeding under Section 144 of the Code on 29-7-1968. On 23-9-1968 he passed the impugned order under Section 145 of the Code to this effect—

"After hearing the lawyers of both the parties and on perusal of their show cause, I am satisfied that there is a bona fide land dispute between the parties. I, therefore, draw up a proceeding under Section 145, Criminal P. C. to decide the factum of possession once for ever. The subject of dispute is attached under Section 145(4) Criminal P. C. Parties to file written statement by 26-10-1968."

5. Learned counsel appearing on behalf of the petitioners raised the following points for consideration by this Court—

(i) The order does not mention that there was an apprehension of breach of peace.

(ii) In the order the entire land has been attached under Section 145(4) of the Code, whereas the subject-matter of dispute is only with respect to 1/3rd share of the land

(iii) There was already a proceeding under Section 145 of the Code in respect of the land contained under Schedule 2 of the application which was later compromised between the parties on 29-8-1962 which could not have been agitated in the present proceeding.

6. Learned counsel has drawn my attention to Cl (1) of Section 145 of the Code and contended that the jurisdiction of the Magistrate to institute proceeding is mainly based on his satisfaction that a dispute is likely to cause breach of peace. When he proceeds under Section 145 of the Code without being satisfied as to the existence of the dispute likely to cause breach of the peace, he acts without jurisdiction. According to the learned counsel Section 537 of the Code cannot cure the irregularity. He submitted that not only in the impugned order but also in the order under Section 144 of the Code the Magistrate omitted to mention regarding the apprehension of breach of peace. He referred to the order dated 29-7-1968 wherein the Magistrate ordered:—

".....I am satisfied with the police report Draw up proceeding under Section 144, Criminal P. C. against both the parties.....".

7. In order to support his contention learned counsel relied on a decision of the Supreme Court in *R. H. Bhutani v. Miss Mani J. Desai*, AIR 1968 SC 1444 wherein their Lordships while dealing with Section 145 of the Code observed in paragraph 8 at page 1447:—

"The object of Section 145, no doubt is to prevent breach of peace and for that end to provide a speedy remedy by bringing the parties before the Court and ascertaining who of them was in actual possession and to maintain status quo until their rights are determined by a competent Court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied of these two conditions, the section requires him to pass a preliminary order under sub-section (1) and thereafter to make an enquiry under sub-section (4) and pass a final order under sub-s. (6).....".

In my opinion, the contention of learned counsel is well founded, as Sec. 145 of the Code also clearly indicates that for initiating the proceeding the Magistrate has to be satisfied that a dispute is likely to cause breach of the peace

8. However, learned counsel appearing on behalf of opposite party Nos. 1 to 3 urged that the said omission in the order is a mere irregularity. He referred to a decision of this Court in *Wazir Mahton v. Badri Mahton*, AIR 1950 Pat 372. But, in my opinion, this case does not support his contention as his Lordship Das, J. (as he then was) in that case was considering the grounds of satisfaction of the Magistrate while initiating the proceeding under Section 145 of the Code, and observed that mere failure to state the reasons why the Magistrate was satisfied that there was an apprehension of breach of the peace is nothing more than an irregularity. It is true, as also held in AIR 1968 SC 1444 (*Supra*), that the High Court in exercise of its revisional jurisdiction would not go into the question of sufficiency of material which has satisfied the Magistrate. In the instant case, the Magistrate has not mentioned at all that there was any apprehension of breach of peace, in the order, which, in my opinion, is fatal. If he would have mentioned that, I would not have questioned the grounds of his satisfaction.

Learned counsel for the opposite party further drew my attention to the notice which was sent to the parties in pursuance of the said order. In the notice it is clearly stated that there was apprehension of breach of peace. But, in my

opinion, the contents of the notice is the result of a ministerial act, and that will not cure the defect in the order. The order itself must indicate that the Magistrate was satisfied that the dispute was likely to cause a breach of the peace. In that view of the matter the contention of learned counsel for the petitioners raised under point No. (i) has got to be accepted.

9. Now I turn to point No (ii). Learned counsel for the petitioners contended that it is admitted case of the parties that the dispute related only to the 1/3rd share of the entire land mentioned in Schedules 1, 2 and 3 of the petition referred to above. It is well established that the subject matter of dispute must be ascertained definitely and described clearly in the preliminary order, before the property is attached under the third proviso to sub-clause (4) of Section 145 of the Code. Absence of clear specification of the subject matter of dispute is a vital defect according to learned counsel.

10. On the other hand, learned counsel appearing on behalf of the opposite party Nos. 1 to 3 submitted that from the records of the proceeding, it is manifest that the subject matter of dispute was only 1/3rd of the share in the entire land, which fact can easily be ascertained by reference to the record and, therefore, there was no uncertainty or vagueness about it. In that view of the matter, according to him, it is not vital and that will not vitiate the proceeding. In this connection reference was made to a Bench decision of this Court in *Shreedhar Thakur v. Kesho Sao*, 1962 BLJR 267 = (AIR 1962 Pat 468).

11. Since I have held while considering Point No' (i) that the order was bad in the absence of finding by the Magistrate that the dispute was likely to cause a breach of the peace, in my opinion, it is not necessary to adjudicate on Point Nos. (ii) and (iii) raised by learned counsel for the petitioners

12. In the result, the order of the Sub-divisional Magistrate is quashed and the application is allowed. However, it is made clear that the Subdivisional Magistrate will call for a fresh report from the Police and will also hear the parties. If he feels satisfied that an apprehension of breach of peace still continues, and an action under Section 145 of the Code is necessary, he will draw up a fresh proceeding in accordance with law and in the light of the observations made above.

Application allowed

1970 CRI. L. J. 1254 (Vol. 76, C. N. 321)=

AIR 1970 ORISSA 171 (V 57 C 57)

B. K. PATRA, J.

State, Petitioner v. Prakash Chandra Agarwalla, Opposite Party

Criminal Revn No. 320 of 1967, D/-3-12-1969, from order of Magistrate 1st Class, Bolangir, D/-26-4-1967.

(A) Criminal P. C. (1898), S. 251-A (2) — Discharge — Accused discharged on ground of non-supply of papers under Section 173 to him — Order must be construed as order of discharge passed in warrant case — Order cannot operate as one of acquittal. (Para 3)

(B) Criminal P. C. (1898), S. 369 — Order of discharge, whether judgment — Accused discharged because of non-supply of documents to him referred to in Section 173—Such order is not a judgment—Magistrate is not debarred from exercising any of powers. AIR 1950 Bom 10, Rel. on; AIR 1953 Orissa 281, Distinguished; AIR 1965 Assam 9, Dissented from.

(Para 6)

Cases Referred: Chronological Paras

(1965) AIR 1965 Assam 9 (V 52)=

1965 (1) Cri LJ 144, State v. Ganga Ram Kalita 7

(1963) AIR 1963 Madh Pra 125

(V 50) = 1963 (1) Cri LJ 442 (2), State of Madhya Pradesh v. Abdul Kadir Khan 4

(1962) AIR 1962 Raj 1 (V 49) =

1962 (1) Cri LJ 80, State of Rajasthan v. Mahmood Ghasi Musalman 4

(1956) AIR 1956 Cal 247 (V 43) =

1956 Cri LJ 732, R N Ghosh v. State 4

(1954) AIR 1954 SC 194 (V 41) =

1954 Cri LJ 475, Surendra Singh v State of Uttar Pradesh 6

(1953) AIR 1953 Orissa 281 (V 40) =

ILR (1952) Cut 311, Krushna Mohan v Sudhakar Das 6

(1950) AIR 1950 Bom 10 (V 37) =

51 Cri LJ 213, In re Wasudeo Narayan Phadnis 6

(1906) ILR 29 Mad 126 = 3 Cri

LJ 274, Emperor v Chinna Kaliappa Goundan 6

(1902) ILR 29 Cal 726 = 6 Cal WN

633 (FB), Mir Ahwad Hussain v Mohammad Aksari 6

(1901) ILR 28 Cal 652 = 5 Cal WN

457 (FB), Dwarka Nath Mondul v Beni Madhab 6

N V. Ramdas, for Petitioner, R C Das, for Opposite Party

ORDER:— The opposite party Prakash Chandra Agarwalla holds a licence under the Orissa Foodgrains Dealers' Licensing Order, 1964 (hereinafter referred to as the Order) and was dealing in wheat and wheat-products. The Inspector, Vigilance,

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Titlagarh inspected his shop on 28-8-1965 and found some irregularities in maintenance of his account books as the books did not show the correct stock of wheat held by him by that day. The opposite party also did not submit fortnightly returns as required under Cl (4) of the Licence. On the aforesaid allegations, the Inspector, Vigilance submitted a prosecution report against him under Section 7 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act) for contravening the conditions of the licence issued to him. In course of search of the shop of opposite party about 17 quintals and 68 kilograms of wheat were found and seized. The opposite party appeared in Court and filed an application that he is entitled to be supplied with necessary documents under S 173, Criminal P C.

This prayer was rejected by the learned Magistrate being of the view that there was no investigation of the case by the Vigilance Inspector and prosecution report was submitted as a Non-FIR case. Another petition filed by the opposite party for release of the wheat to him was also dismissed. As against the two orders passed by the Magistrate, the Sessions Judge was moved in revision and he made a reference to this Court recommending that the two orders might be quashed. In criminal reference No 6 of 1966, Das, J. ordered that the seized stock of wheat should be released and sold through the opposite party or some other control dealers and the sale proceeds be deposited in Court until disposal of the case against the opposite party.

The question as to whether papers should be supplied to the opposite party under Section 173, Criminal P. C was not specifically dealt with in the judgment. The order, however, was the reference was accepted. On receipt of this order, the learned Magistrate directed the prosecution to supply necessary papers to the opposite party. The prosecution appears to have taken the stand that there was no such direction in the order passed by the High Court and that an opportunity might be afforded for hearing of this question and 9-1-1967 was fixed for hearing the objections raised by the prosecution. On 9-1-1967, the learned Magistrate discharged the opposite party under Section 251-A (2), Criminal P C on the ground that despite the orders of the High Court, papers under Section 173, Criminal P C had not been supplied to the accused.

On 16-1-1967, the Inspector, Vigilance filed the necessary papers under Sec 173, Criminal P C and also submitted an application stating that he could not do so on the last date of hearing, namely 9-1-1967, as he was absent and prayed that the order dated 9-1-1967 might be recalled. The learned Magistrate allowed the application and recalled the order passed

on 9-1-1967. On 4-3-1967, the opposite party filed an application under S. 540-A, Criminal P. C stating that the order dated 16-1-1967 passed by the learned Magistrate recalling the order dated 9-1-1967 is without jurisdiction, that this being a summons case, the order of discharge recorded on 9-1-1967 amounts to an order of acquittal and that therefore, the learned Magistrate had no power either to recall it or to set it aside.

By order dated 26-4-1967, the learned Magistrate accepted the aforesaid contention of the opposite party and rejected the prayer of the prosecution to restore the case to file. It is against this order dated 26-4-1967 that the present revision application has been filed.

2. Mr. Ramdas appearing for the State puts forth the following contentions in support of the application:—

(1) The opposite party has contravened an order made with reference to clause (d) of sub-section (2) of Section 3 of the Act, the penalty prescribed for which under Section 7 (1) (a) (ii) of the Act is imprisonment for a term which may extend to five years and consequently this is a warrant case and the order dated 9-1-1967 passed by the Magistrate is therefore, an order of discharge and not of acquittal.

(2) As against an order of discharge, a superior Court may no doubt be moved to set it aside. But it is also open to the prosecution to submit a fresh complaint against the accused. In such circumstances, there can be no reason why the Magistrate himself cannot exercise his inherent jurisdiction to review his own order and rehear the case. In this view, the order passed by the Magistrate on 16-1-1967 is legal.

Mr. R. C Ram, appearing for the opposite party submits—

(1) that the prosecution of the opposite party is for contravention of the order made with reference to clause (i) of sub-section (2) of Section 3 of the Act, the penalty for which is imprisonment for a term which extends to one year and as such it is a summons case, and an order of discharge passed against an accused in such a case amounts to an order of acquittal which having become final cannot be set aside by the Magistrate by his subsequent order dated 16-1-1967, and

(2) that assuming that it is a warrant case and the order passed on 9-1-1967 is only an order of discharge, the only remedy available to the prosecution is to approach the superior Court for setting aside the order of discharge and the Magistrate has no inherent jurisdiction to set aside that order.

These contentions require careful consideration.

3. To appreciate the contentions of the parties, it is necessary to quote the rele-

vant provisions of Sections 3 and 7 of the Act.

"Section 3— Power to control production, supply, distribution, etc., of essential commodities"

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-s. (1), an order made thereunder may provide—

x x x x
(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption, of any essential commodity;

x x x x
(h) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters;

(i) for requiring persons engaged in the production, supply or distribution of, or trade and commerce in, any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto, as may be specified in the order;

x x x x
"7. Penalties:— (1) If any person contravenes, whether knowingly, intentionally or otherwise, any order made under Section 3—

(a) he shall be punishable—

(i) in the case of an order made with reference to Cl. (h) or Cl. (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which may extend to five years and shall also be liable to fine;

Provided that in the case of a first offence, if the Court is of opinion that a sentence of fine only will meet the ends of justice, it may, for reasons to be recorded, refrain from imposing a sentence of imprisonment and in the case of a second or subsequent offence, the Court shall impose a sentence of imprisonment and such imprisonment shall not be less than one month; and

x x x x
Neither Cl (h) nor Cl (i) of S. 3 of the Act contemplates prescription of any licence. Such prescription is contained only in Cl (d). In exercise of the powers conferred by Section 3 of the Act and with prior concurrence of the Central Govern-

ment, the State Government had made the Order. Paragraph 3 of the Order requires that no person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority. Para 4 prescribes that every application for a licence or renewal thereof shall be made to the Licensing Authority in Form A, and that every licence issued, reissued or renewed under this order shall be in Form B. The form of the licence is set out in Form B and Cls. 3 and 4 thereof may be quoted

"FORM B
(See Clause 4 (2))

x x x x

3 (i) The licensee shall except when specially exempted by the State Government or by the licensing authority in this behalf, maintain a register of daily accounts for each of the foodgrains mentioned in paragraph 1, showing correctly—

(a) the opening stock on each day,

(b) the quantities received on each day showing the place from where and the source from which received,

(c) the quantities delivered or otherwise removed on each day showing the places of destination; and

(d) the closing stock on each day

(ii) The licensee shall complete his accounts for each day on the day to which they relate, unless prevented by reasonable cause the burden of proving which, shall be upon him.

(iii) A licensee who is a producer himself shall separately show the stocks of his own produce in the daily accounts, if such stocks are stored in his business premises

4 The licensee shall, except when specially exempted by the State Government or by an officer authorised by the State Government in this behalf submit to the licensing authority receipts and deliveries of each of the foodgrains every fortnight (1st to 15th and 16th to end of one month), so as to reach him within..... days after the close of the fortnight"

It is thus manifest that the licence, the conditions whereof have been alleged to have been violated by the opposite party is one prescribed in the Order which has been made in pursuance of Section 3(2) (d) of the Act. I am unable to accept Mr. Ram's contention that the Order is one made in pursuance of the power vested in Government under Section 3(2) (h) or 3(2) (i) of the Act. If the licensing Order is one made with reference to clause (d) of sub-section (2) of Section 3 of the Act, a contravention thereof is punishable under Section 7(1) (a) (i) of the Act which prescribes a penalty of imprisonment which may extend to five years and also fine

Since "warrant case" as defined in Section 4(1) (w), Cr. P. C. means a case

relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year, a case which falls under Section 7(1) (a) (ii) of the Act is a warrant case. In fact, the learned Magistrate dealt with the case as such. The order passed by the Magistrate on 9-1-1967 must therefore be construed as an order of discharge passed in a warrant case by reason of the fact that the prosecution was absent in Court on that day and he failed to file in Court the papers referred to in Section 173, Cr. P. C.

4. Even assuming that Mr Ram is correct in his submission that this is a summons case, still the order passed by the Magistrate on 9-1-67 cannot be said to operate as an order of acquittal. The procedure for the trial of a summons case is prescribed in Chapter XX of the Code of Criminal Procedure. There are only two sections in the Chapter, namely, Sections 247 and 249 which deal with consequences that would ensue where the complainant fails to appear in Court. It is clear from a reading of the two sections that Section 247 applies to a case where summons has been issued on complainant and on the date for appearance of the accused or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear and it provides that in such an event the Court may acquit the accused.

Section 249, on the other hand, applies to a case instituted otherwise than upon a complaint in which case, a Magistrate, 1st class, may for reasons to be recorded by him, stop proceedings at any stage without pronouncing a judgment either of acquittal or conviction and thereupon may release the accused. It is now well settled that where a report is submitted by a Police Officer in the capacity of his being an officer of the Police, such report cannot be considered anything other than a Police report though it may pertain to a non-cognizable offence. Such police reports cannot be regarded as complaints within the meaning of Section 4(1) (h), Cr. P. C. and to a case registered on such a police report, the provisions of Section 247 are not attracted and it is not competent to a Magistrate to dismiss the case and acquit the accused merely because the prosecuting officer makes default in his appearance. See *R. N. Ghosh v. The State*, AIR 1956 Cal 247, *State of Rajasthan v. Mahmood Ghazi Musalman*, AIR 1962 Raj 1 and *State of Madhya Pradesh v. Abdul Kadir Khan*, AIR 1963 Madh Pra 125.

This being the position in law, the order passed by the learned Magistrate on 9-1-1967 cannot be treated as one of acquittal passed under Section 247, Cr. P. C. but the order must be deemed to be one passed under Section 249, Cr. P. C.

The Magistrate who makes an order staying proceedings under Section 249, Cr. P. C. undoubtedly possesses sufficient powers to remove the order of stay and proceed further. It can never be argued that an order stopping the proceedings under Section 249, Cr. P. C. can ever operate as an acquittal and in this view it cannot be said that the Magistrate purporting to act under Section 249 of the Code has no power to revive the proceedings.

5. If Mr. Ram's contention that is a summons case is accepted, it must follow that the order passed by the learned Magistrate on 9-1-67 would only amount to an order passed under Section 249 of the Code stopping further proceedings and the one passed by him on 16-1-1967 is an order reviving the proceedings which he was perfectly competent to do and consequently the impugned order passed by him on 26-4-1967 would not be legal and has to be set aside.

6. In view however of my finding that the present case is a warrant case, the order passed by the learned Magistrate on 9-1-67 is one of discharge, the question arises whether the subsequent order passed by him on 16-1-1967 recalling the order of discharge is valid. It is argued on behalf of the opposite party that when the Magistrate passed the order of discharge he became *functus officio* and that therefore he had no power to rehear the case. A reference in this connection was made to Section 369, Cr. P. C. which provides that no Court, when it has signed its judgment, shall alter or review the same, except a clerical error, and it is contended that the order of discharge is a judgment and therefore the Magistrate could not revive the proceedings of his own accord because it would tantamount to reviving his own order which is prohibited under Section 369, Cr. P. C.

I am unable to accept this contention. An examination of the various provisions of the Code will show that every order passed by a Magistrate under the Code is not a judgment within the meaning of Section 369, Cr. P. C. In order to constitute a 'judgment', there must be an investigation of the merits of the case on evidence and after hearing the arguments. Where, however, the order is passed summarily without consideration of the entire evidence, as in the case of the order of discharge passed in this case, it will not obviously amount to a judgment. In *Dwarakanath Mondul v Beni Madhab*, (1901) ILR 28 Cal 652 (FB), a Presidency Magistrate in Calcutta dismissed the complaint as the complainant was absent. Subsequently on the application of the complainant, he revived the case and issued a summons. The accused ap-

plied to the High Court to have the order of revival set aside.

The case first came up for hearing before a Division Bench. In view of the conflict of authority on the question of competence of a Magistrate, to revive a warrant case in which he had made an order of discharge, the matter was referred to a Full Bench of seven Judges. The question referred to the Full Bench was:

"Whether a Presidency Magistrate is competent to revive a warrant case, triable under Chapter XXI of the Code of Criminal Procedure, in which he had discharged the accused person."

Six out of the seven Judges who constituted the Bench answered the question in the affirmative, Ghose, J., who delivered a dissenting judgment, was not prepared to go so far as the other judges and held that every order of discharge could be reviewed by the Magistrate who had passed it. In his opinion, a Magistrate is competent to review an order of discharge, if it is passed without investigation into the merits of the complaint. This Full Bench decision was followed by another Full Bench of the Calcutta High Court in *Mir Ahwad Hossein v. Moham-mad Askari*, ILR 29 Cal 726 (FB).

That was a case in respect of a complaint filed before a Magistrate in the *mofussil*, and the question referred to the Full Bench was:

"Whether a Magistrate in a warrant case having passed an order of discharge is competent to take fresh proceedings and issue process against the accused in respect of the same offence, unless an order for further enquiry shall have been passed under Section 437, Criminal Procedure Code, having the effect of setting aside such order of discharge."

Four out of the five Judges who constituted the Full Bench answered this question in the affirmative. Ghose, J., who dissented from the majority of the Judges, answered the general question referred to the Full Bench in the negative. But in doing so, he referred to the observations made by him in (1901) ILR 28 Cal 652 (FB) and stated:

"I feel, however, bound to say, at the same time, that the order of discharge made by the Magistrate in the present case does not amount to a judgment within the meaning of Section 369 or Section 367, Criminal Procedure Code. There was no judicial investigation by the Magistrate of the merits of the complaint, and therefore, as explained in my judgment in the case of (1901) ILR 28 Cal 652 (FB), the order of discharge would be no bar to the revival of the same complaint."

These decisions of the Calcutta High Court were approved and followed by a Full Bench of the Madras High Court:

Emperor v Chinna Kaliappa Goundan, (1903) ILR 29 Mad 126 in which it was held that the dismissal of a complaint under Section 203, Criminal Procedure Code does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such an order of discharge has not been set aside by a competent authority. It may be stated here that the majority of Judges who decided (1901) ILR 28 Cal 652 (FB) were of opinion that the judgment referred to in Sections 367 and 369, Cr P. C is only a judgment of conviction or acquittal and this is apparent from what Princep, J observed at page 660 —

"But it has been argued that an order dismissing a complaint or discharging an accused person in a judgment within the terms of Chapter XXVI, Criminal Procedure Code, and that by reason of Section 364 the Court, which passed the judgment, is unable to alter or review it. Now, here I would state that in my opinion such an order is not a judgment within the terms of Chapter XXVI. Section 367 explains what constitutes a judgment and it clearly indicates to my mind that a judgment within that Chapter is only a judgment of acquittal or of conviction. In the case of an order of discharge, or in the case of an order dismissing a complaint, it is expressly required by the law that the Magistrate shall state his reasons, and I therefore take it that, if it had not been so required, it would have been unnecessary for a Magistrate to state any reasons for his order. Consequently in this point of view, the order would not constitute a judgment. And it seems to me, also, that the expression "judgment" itself indicates some final determination of the case which would end it once for all, such as an order of conviction or acquittal."

In *Surendra Singh v State of Uttar Pradesh*, AIR 1954 SC 194, their Lordships of the Supreme Court after referring to Section 369, Cr. P. C observed —

"In our opinion, a judgment within the meaning of this section is the final decision of the Court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open court. It is a judicial act which must be performed in a judicial way."

In order to constitute a judgment, therefore, the decision of the Criminal Court must be final. The order of discharge cannot be regarded as the final pronouncement of the Magistrate, because, as laid down by authorities, a fresh complaint may be made on the same facts, notwithstanding the order of discharge. A final judgment in a criminal proceeding must necessarily be a judgment of either acquittal or conviction, because till then there is no final order, and the defence of *autrefois acquit* has no appli-

cation. Section 403 of the Code provides that a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been under Section 236, or for which he might have been convicted under Section 237.

The Explanation to that section states that the dismissal of a complaint, the stopping of proceedings under Sec 249, the discharge of accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section. Under this section, therefore, a judgment which bars a second trial must be the final order in a trial terminating either in the conviction or acquittal of the accused. It is therefore clear from what has been stated above that unless the order is final it is not a judgment in the true sense of the term, and it is plain that the order of discharge is not a final order, since accused may be prosecuted subsequently on the same facts and for the same offence, and therefore, clearly enough the order of discharge is not a judgment and does not come within the mischief of Section 369, Cr. P. C.

It is therefore possible to argue that as a Magistrate has jurisdiction to take cognizance of the same offence again, when a fresh complaint is brought on the same facts, he is not deprived of his jurisdiction when, instead of filing a new complaint, the complainant makes an application to him to revive the original complaint and that the Magistrate is competent to rehear the case by reviving the original complaint. Orders of discharge can however be divided into two categories, namely, cases in which the order of discharge is passed after appreciation of the evidence with a view to determine the guilt or innocence of the accused and those in which the proceedings are terminated merely for some technical reason, such as the absence of the complainant. The present case is one which falls in the latter category.

This is not a case where the learned Magistrate has applied his mind to the allegations made against the accused and had found that there is no *prima facie* case against him. He discharged the accused merely because the prosecuting officer was not present in Court and did not supply to the accused the documents referred to in Section 173, Cr. P. C. An order of discharge passed in such circumstances is not a decision given on merits and cannot be called a judgment. Consequently, the Magistrate is not debarred

from reviewing it, setting it aside and reviving the old complaint. This view receives support from a decision of the Bombay High Court in *In Re Wasudeo Narayan Phadnis*, AIR 1950 Bom 10. My attention was drawn to a Bench decision of our Court in *Krushna Mohan v. Sudhakar Das*, AIR 1953 Orissa 281.

That was a case under Section 145, Cr. P. C. and their Lordships held that a Magistrate cannot invoke his inherent jurisdiction to revive his orders under Section 145(6) Cr. P. C. because sub-section (6) of Section 145 in express terms confers finality on that order. Their Lordships, however, added that where, however, an order under Section 145(6), Cr. P. C. is itself a nullity due to the failure to serve the required preliminary notices under sub-section (1) of Section 145 on all the parties, the Magistrate may invoke his inherent powers and ignore the same. That case is, therefore clearly distinguishable.

7. It is finally argued that where an accused is discharged by a Magistrate, the Code provides a remedy and enables the prosecution to approach superior Court to set aside the order of discharge and that when where there is such specific provision in the Code, it was not open to the Magistrate at a later stage to review his own order and revive the proceedings. In support of this contention, reliance is placed on a decision of the Assam High Court reported in *State v. Ganga Ram Kalita*, AIR 1965 Assam 9 where the learned Chief Justice held that where a discharge order has been passed, the Magistrate becomes functus officio so far as the case is concerned, and unless there is a fresh complaint or a fresh charge-sheet, no action in the matter can be taken by the Magistrate, and that in the absence of any complaint, any attempt to go back on the order of discharge passed by him and to revive the case would amount in law to a review of the judgment of the Magistrate which is not permissible having regard to Section 369, Cr. P. C.

The learned Chief Justice, therefore, held that the order of the Magistrate suo motu reviving the case and proceeding with the trial of the same on its merits is clearly devoid of jurisdiction and illegal. With great respect, I am unable to share this view which appears to be opposed to the consensus decisions already referred to. I do not think, that in substance, with reference to the question of jurisdiction any distinction can be drawn between entertaining a fresh complaint and the rehearing of the original complaint. The argument that the Magistrate having made the order of dismissal is functus officio applies equally to both cases and the formality of putting a fresh complaint cannot be said to create a

jurisdiction which without such formality a Magistrate would not have passed.

The remedy provided in Sections 436 and 437, Cr. P. C. are only enabling provisions and do not take away the jurisdiction vested in a Magistrate to rehear the complaint. The fact that the complainant has this remedy available to him would not be a sufficient ground for holding that the Magistrate is not competent to revive the order of discharge passed by him, based on a technical reason such as absence of the complainant.

8. In the result, I would hold that the order passed by the learned Magistrate on 16-1-1967 reviving the case against the accused was perfectly a legal order and the subsequent order passed by him on 26-4-1967 is illegal. I would accordingly allow this application, set aside the order dated 26-4-1967 passed by the learned Magistrate and order that the case be sent down to the learned Magistrate for disposal according to law.

Revision allowed

1970 CRI. L. J. 1259 (Vol. 76, C. N. 322) =
AIR 1970 RAJASTHAN 203 (V 57 C 43)

L. S. MEHTA, J

Johri, Petitioner v. The State, Opposite Party.

Criminal Revn. No 271 of 1968, D/- 15-10-1969, from order of S. J., Alwar, D/- 9-5-1968.

Penal Code (1860), S. 429 — Mischief by killing maimed cattle — Essential ingredient of offence under — Existence of requisite intention or knowledge necessary — Accused throwing stone towards complainant and not towards calf to cause wrongful loss or damage to complainant — Calf sustaining injury on its nasal region and dying — Essential ingredient being absent, section did not apply. AIR 1958 Raj 347 and AIR 1953 Sau 158, Ref. to. (Paras 5, 6)

Cases Referred: Chronological Paras

(1958) AIR 1958 Raj 347 (V 45) =

1957 Raj LW 642 = 1959 Cri LJ

87, Arjunsingh v The State 5

(1953) AIR 1953 Sau 158 (V 40) =

1953 Cri LJ 1350, Bhagwan v.

State 5

(1901) Cri. Revn Case No 434 of

1901 = 1 Weir Cr R 502, In the

matter of Obammal 5

P. N. Dutt, for Petitioner; A. K. Mathur,

Dy. Govt Advocate, for Opposite Party.

ORDER: On June 16, 1966, the complainant Ratna's cow entered the house of the accused Johri at about noon. This led to altercations between Ratna and Johri. The accused Krishanlal and Rewaria sided Johri. The accused Johri is said to have thrown a

DN/EN/C6/70/VRB/C

stone towards Ratna. The stone accidentally fell on Ratna's calf tethered nearby as a result of which it sustained an injury on its nasal region and died soon after. A report of this incident was made at the police station, Rajgarh, district Alwar. The police investigated the matter and put up a challan against the accused Johri, Kishan and Rewaria for offences under Sections 429, 448 and 323, I. P. C., in the Court of the Munsiff Magistrate, Rajgarh (Alwar). The prosecution examined six witnesses, including P.W. 5, Veterinary Assistant Surgeon, Dr Parmeshwar Sahai.

The accused denied to have committed the offence in their statements recorded under S. 342, Cr. P. C. They did not produce any evidence in their defence. The trial Court by its judgment dated January 29, 1968, acquitted the accused Kishanlal and Rewaria of all the charges. He also acquitted Johri for offences under Sections 448 and 323, I. P. C. He, however, convicted Johri under Section 429, I. P. C., and sentenced him to rigorous imprisonment for two months and to pay a fine of Rs. 50, in default to further suffer rigorous imprisonment for 15 days. An appeal was taken against that judgment by the accused Johri in the Court of Sessions Judge, Alwar. The appellate Court by its judgment, dated May 9, 1968, partially accepted the appeal and, while maintaining the conviction of the appellant under S. 429, I. P. C., reduced the substantive sentence of two months' rigorous imprisonment to one till the rising of the Court and kept the sentence of fine of Rs. 50 intact. Hence, this revision.

2. Learned counsel for the petitioner submits that the judgment of the Court below is in direct conflict with the provisions of Section 429, I. P. C., as the prosecution has failed to bring home intention or knowledge of the accused to commit mischief.

3. In this case from the statement of P.W. 2 Parbhata, P.W. 3 Kannu and P.W. 4 Ratna, it is clear that when Ratna's cow entered Johari's house, there were altercations between Ratna and Johari. The cow was driven out by Johari. Ratna's calf was also found tethered on Ratna's 'Chabutari'. The calf was untied by Johri. Ratna objected to this and again tied the animal. Thereupon Johri wanted to pelt stones towards Ratna, but accidentally the stone fell on the calf on its nasal region, resulting in its death.

4. Section 429, I. P. C., necessitates three things (1) intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person, (2) causing the destruction of some property or any change in it or in its situation, and (3) such change must destroy or diminish the property mentioned in the section itself. In this case, evidence shows that the calf died as a result of the stone falling upon it accidentally. The question remains whether it should be inferred from the circumstances of the case that the accused had had the in-

tention or knowledge of likelihood of causing wrongful loss or damage to the public or to any person. There is not an iota of evidence on the record from which such an intention or knowledge can be gathered. The only evidence is that the accused wanted to throw stone towards Ratna and not towards the calf with a view to cause wrongful loss or damage to Ratna. Since the first and the most important ingredient of the offence under Section 429, I. P. C., is totally absent, the Court below went wrong in holding that Section 429, I. P. C., was applicable to this case.

5. In *Arjun Singh v. The State*, 1957, Raj LW 642 = (AIR 1958 Raj 347), it has been observed by this Court:

"In order to prove an offence of mischief, it is necessary for the prosecution to establish that the accused had an intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person."

It has further been observed in this case that if an animal is killed accidentally, whatever may be the responsibility of the accused to compensate its owner for the loss of property caused to him in a Civil Court, it cannot be said with any justification that he committed a criminal offence under Section 429, I. P. C. A Division Bench of the Saurashtra High Court consisting of Shah, C. J. and Baxi, J., reported as *Bhagwan v. State*, AIR 1953 Sau 158, has held that the offence of mischief under Section 429, I. P. C., is committed if the offender commits mischief by killing, poisoning, maiming or rendering useless any buffalo, etc. Under Section 425, I. P. C., a person is said to commit mischief with intent to cause or knowing that he is likely to cause wrongful loss to a person causes the destruction of any property. The existence of the requisite intention or knowledge is, therefore, an essential ingredient to the offence and the accused cannot be convicted under Section 429, I. P. C., unless it is established that the act of killing, etc., was with the requisite intention or knowledge.

There is another relevant citation found in Criminal Revision Case No 434 of 1901 = 1 Weir 502, in the matter of *Obammal*, accused. In that case the accused Obammal was convicted under S. 429, I. P. C., and sentenced to pay a fine of Rs 20 or, in default, to undergo rigorous imprisonment for 20 days. The mischief consisted in throwing a stone at a young buffalo and thereby causing its death. The stone was thrown to drive the animal out of the backyard and the animal after running some distance fell down and died. The prosecution witnesses stated that the accused threw a brick at the buffalo and caused its death. There was, however, nothing to show that the accused had in throwing the stone, any intention to cause injury to the animal or reasonable cause to suppose that loss or damage was likely to be caused. The

Madras High Court held that in these circumstances the conviction was wrong

6. In this case, as has been said above, there is nothing to show that the accused had in throwing the stone intention to cause injury to the animal or that he had the knowledge that his act would result in damage to the complainant Ratna. There is also no evidence to suggest what the size of the stone was. The sole intention of the accused appears to have been to throw a stone towards Ratna. The stone accidentally fell upon the calf. Under these circumstances, the conviction made by the Court below was bad in law.

7. In the result, the conviction of the accused John is set aside and he is acquitted of the offence under Section 429, I. P. C. The amount of fine, if levied, must be refunded to him.

Conviction set aside.

1270 CRI. L. J. 1261 (Vol. 76, C. N. 323) =

AIR 1970 SUPREME COURT 1362

(V 57 C 286)

(From: Bombay)

M. HIDAYATULLAH, C. J., A. N.

RAY AND I. D. DUA, JJ.

V. R. Bhate and others, Appellants v. The State of Maharashtra, Respondent.

Criminal Appeal No. 145 of 1967, D/- 13-3-1970.

Penal Code (1860), Section 282 — Conveying person by water for hire in unsafe or over-loaded vessel.

Where the overloading of the launch had not caused danger to the passengers but the launch capsized on account of sudden onrush of persons waiting at the jetty on to the deck of the launch and passengers on the launch wanting to get down at the port which caused the launch to tilt and resulted in displacement of balance:

Held that the capsizing could not be held to be due to negligence of the owner or the master of the launch and that the conviction under Section 282 was not proper. (Para 15)

The following Judgment of the Court was delivered by

RAY, J.: This is an appeal by special leave from the judgment dated 26th June 1967 of the High Court at Bombay convicting Vishwanath Raghunath Bhate, Yeshwant Krishna Karmarkar and Ismail Shaikh Daud Pawaskar, accused Nos. 1, 4 and 5 respectively under Section 282 of the Indian Penal Code. Accused No.

1, Bhate was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000 and in default to undergo a further rigorous imprisonment for one month. Accused No. 4 Yeshwant Krishna Karmarkar was sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 1,000 and in default to undergo a further rigorous imprisonment for one month. Accused No. 5, Pawaskar who was the captain of the launch was sentenced under section 282 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for one month.

2. The High Court also convicted accused Nos. 1, 2, 4 and 5, viz., V. R. Bhate, Ganesh Krishna Karmarkar, Yeshwant Krishna Karmarkar and Ismail Shaikh Daud Pawaskar, for offences under section 58 of the Inland Steam Vessels Act. No separate sentence was passed on accused Nos. 1, 4 and 5 viz., V. R. Bhate, Yeshwant Krishna Karmarkar and Ismail Shaikh Daud Pawaskar under Section 58 of the Inland Steam Vessels Act, 1917 though their convictions under the said section were confirmed and the separate sentences imposed by the Sessions Judge were set aside. The fine of Rs. 990 at the rate of Rs. 10 per extra passenger was imposed on Ganesh Krishna Karmarkar, accused No. 2 and in default simple imprisonment for one month

3. V. R. Bhate, Ganesh Krishna Karmarkar, Madhusudan Krishna Karmarkar and Yeshwant Krishna Karmarkar, accused Nos. 1, 2, 3 and 4 respectively and one Anant Krishna Karmarkar since deceased were partners of a firm under the name and style of Shrikrishna Motor Launch Service. The said firm had its head office at Veavi and also another office at Bombay. The firm used to ply its motor launches, whereof M. L. Hyderi was one, in the Bankot creek in Kolaba District, Bombay and used to carry passengers on hire from Bagamandale to Dasgaon. There are 28 ports in all in this creek Bagamandale is the first and Dasgaon is the last port. Port Mhapral where the incident forming the subject matter of this appeal took place on 1st January, 1962 is the 26th Port. Accused No. 5 Pawaskar was the master of the launch. Accused No. 6 Ramchandra was the ticket collector. The other five accused formed the crew of the launch in question.

4. The prosecution case is that, all the accused were continuously overloading the Hyderi launch during its journey in the Bankot creek and in the month of October, 1961 all the accused entered into an agreement with one another for doing an illegal act, namely, conveying for hire on Hyderi launch several passengers in excess of the number prescribed in the certificate of survey. It is alleged that in pursuance of the said conspiracy between them accused Nos. 5 and 6 the master and the ticket collector illegally overloaded the launch Hyderi on 1st January, 1962 and actually carried 187 passengers by the said launch. It is further alleged that because of this overloading the launch capsized at Mhapral jetty resulting in the death of 68 persons.

5. The alleged incident took place at about 1 p. m. on the New Year's day 1962 at Mhapral. The charges framed against the accused were under Sections 120B and 282 of the Indian Penal Code and Section 58 of the Inland Steam Vessels Act, 1917 and Section 54 of the Indian Ports Act read with Rule 19 of the Bombay Minor Ports Passengers Vessels Rules. The crew accused Nos. 5 to 11 were also charged for offences under Section 63 of the Inland Steam Vessels Act and Section 304A of the Indian Penal Code.

6. On the New Year's Day, 1962 the launch Hyderi capsized at Mhapral port. The principal question which falls for consideration is whether the launch Hyderi capsized at Mhapral port because of overloading of the launch or because of stampede caused by persons from the jetty on the one hand who rushed on to the launch and got on to its deck and passengers on the launch of the other who went to the deck for disembarking at the port.

7. On the relevant date the launch was carrying 125 passengers when it reached Mhapral. The certificate of survey issued on 3rd November, 1961 by the Principal Officer, Mercantile Marine Department, Bombay District under the Inland Steam Vessels Act, 1917 (Exhibit 166) showed that besides the crew of 6 persons the launch was authorised to carry 46 passengers. The launch was 42 feet 6 tenths in length and 42 feet 2 tenths in breadth, 3 feet 9 tenths in depth. The gross tonnage was 12 21. It was an open launch. It had roof which was 32 feet in length and 11½ feet in breadth.

The roof was known as sun-deck or awning.

8. On the crucial date a large number of persons were present at the Mhapral jetty at the time of the arrival of launch Hyderi. When the launch reached Mhapral port and after it had been tied to the stones of the jetty with ropes, persons from the jetty rushed on to the deck of the launch and the passengers on the launch including those who wanted to get down at Mhapral also thronged on the deck. This assembly of so many persons on the deck caused the sudden shifting of weight on one side. The launch first tilted towards the jetty and water gushed into the launch. Because of this the passengers on the launch were frightened and they moved to the other side with the result that the ropes gave way and the launch tilted on the other side and capsized. This was the evidence of the majority of the witnesses.

9. One of the expert witnesses Donald Dyer said that when the passengers in the launch out of fright moved from one side to the other and thus caused the launch to heel to that side, the heeling was due to the shift of weight inside the launch. It was also the evidence of the expert witness that there was no possibility for such a shift of weight to take place when the launch was packed to its capacity. He also said that 182 passengers could be accommodated on the launch but 129 of the 182 could sit at the bottom of the launch either on seats or on the floor and the rest could stand. The witness said that the vessel capsizes when its centre of gravity goes above the point of metacentre. The metacentre is a point round which the vessel might be said to rotate transversely. Centre of gravity is that point above which all loads on the vessel are assumed to be acting.

10. 68 persons died when the launch capsized. Six of them were among the many who rushed on to the deck of the launch from the jetty at Mhapral. The other 62 who died consisted of passengers. About 30 passengers on the launch wanted to get off at Mhapral. They had come on to the deck at the port side for disembarkation. There were no barricades at Mhapral jetty. There was no policeman or any other person in authority or any person on behalf of the firm to regulate and control the entry and exit of the passengers. More than 100 persons were waiting on the jetty for the

arrival of the launch. The people scrambled for entry on the launch and they rushed on with rapidity. When the persons from the jetty rushed on to the deck regardless of disembarkation of passengers, the weight of the crowd resulted in the launch heeling towards the port side. Water flowed into the launch. There was panic. Particularly passengers sitting at the bottom of the launch were seized by fear of life. Those passengers as also persons who were at the deck went to the other side of the deck, namely the opposite side of the jetty in the hope of adjusting the balance. The result was that the launch again heeled on the other side of the jetty and the ropes with which the launch had been tied snapped and broke. The launch capsized.

11. The trial Court found that accused No. 5 Ismail Shaikh Daud Pawaskar, the master and accused No. 6 Ramchandra, the ticket collector were responsible for overcrowding of the launch and for carrying a large number of passengers in excess of the licensed number. The trial court did not accept the charge of conspiracy.

12. The trial Court, however, found that accused Nos. 1, 2 and 4, V. R. Bhate, Ganesh Krishna Karmaikar and Yeshwant Krishna Karmarkar, partners of the firm should have had knowledge of overcrowding and therefore they were negligent in not taking due care to stop overcrowding and were therefore guilty of an offence under Section 282 of the Indian Penal Code. The excess number of passengers however was held by the trial Court not to be the immediate cause of directing the capsize of the launch. The trial Court also found accused Nos. 5 and 6 guilty of an offence under Section 282 of the Indian Penal Code. The trial Court convicted each of the accused Nos. 1, 2, 4, 5 and 6 under Section 282 of the Indian Penal Code and sentenced each of them to pay a fine of Rs 500 and in default simple imprisonment for one month.

13. The trial Court held that under Section 58 of the Inland Steam Vessels Act the owner and the master were liable. Accused No. 5 was held liable because he was the master. Accused Nos. 1 and 2 were found to be partners of the firm which was in ownership of the launch and accused No 4 who was the certified owner of the launch was also held liable under Section 58 of the Inland Steam Vessels Act. The trial Court con-

victed accused Nos. 1, 2, 4 and 5 under Section 58 of the Inland Steam Vessels Act and sentenced each of them to pay a fine of Rs. 495 and in default simple imprisonment for one month.

14. The High Court, however, found that the death of 68 persons was the result of the capsizing of the launch in the circumstances which could be said to be materially but not solely contributed by the overloading of the launch. The High Court said that because of the overloading of the passengers the crew of the launch was not in a position to regulate the entry of the incoming passengers or the exit of the outgoing passengers who were to disembark at the Mhapral port.

15. It cannot be denied that the number of passengers was in excess of the permissible limit. The overloading did not cause danger to the passengers of the launch at all in the year 1961 when it was overloaded at all seasons. Again the overloading did not endanger the passengers on the fateful day when the launch plied from the port of origin to the 26th port. It was only when the launch arrived at port Mhapral which was the 26th port that there was a sudden onrush of persons waiting at the jetty on to the deck of the launch. That happened after the launch had been tied to the jetty. The persons from the jetty rushed on to the launch and the passengers on the launch who wanted to get down at Mhapral port had also assembled on the deck of the launch. It is because of this shifting of weight on one side that the launch became tilted towards the jetty and water flowed into the launch. The passengers on the launch were frightened and they moved to the other side. The weight was then suddenly shifted to the other side. The launch tilted and as a result thereof the ropes gave way and the launch capsized. It cannot, therefore, be said that the capsizing of the launch was because of any negligence of the owners or the master. The launch capsized by reason of the stampede that followed the sudden rush of persons waiting at the jetty on to the launch which resulted in displacement of the balance of the launch and breaking away of the ropes and capsizing of the launch. We are, therefore, of opinion that the conviction under Section 282 of the Indian Penal Code cannot be sustained.

16. The next question is whether the appellants are liable under Section 58 of

the Inland Steam Vessels Act. Accused Nos. 1 and 2 have been found to be the partners and accused No. 4 is the owner of the vessel. The courts found that there was no evidence to hold that accused No. 3 was a partner. Accused No. 5 was the master. The liability under Section 58 is penalty for carrying excessive number of passengers on board. If an inland steam vessel has on board or in any part thereof a number of passengers which is greater than the number set forth in the certificate of survey as the number of passengers which the vessel or the part thereof is, in the judgment of the surveyor, fit to carry, the owner and the master shall each be punishable with fine which may extend to Rs. 10 for every passenger over and above that number. The evidence is that the launch was permitted to carry 46 passengers. That was the limit of passengers. It is true that the licence at the relevant date was not in evidence. In the trial Court as also in the High Court the case proceeded on that basis. It is also in evidence that the number of passengers on the launch at the relevant date was 125. The number of passengers in excess was 79. The liability is at the rate of Rs 10/- per passenger. Therefore accused Nos. 1 and 2 the partners and accused No. 4 the owner of the launch and accused No. 5, the master are each liable. A fine of Rs 790 is imposed on each of the accused Nos. 1, 2, 4 and 5. The conviction of the appellants under Section 282 of the Indian Penal Code is set aside. The conviction of the appellants under section 58 of the Inland Steam Vessels Act is upheld but the imposition of fine is altered.

17. The appeal is allowed as far as conviction under Section 282 of the Indian Penal Code is concerned and the conviction under Section 58 of the Inland Steam Vessels Act is confirmed with the modification of the imposition of the fine.

Appeal partly allowed.

1970 CRI. L. J. 1264 (Vol. 76, C. N. 325) =
AIR 1970 SUPREME COURT 1365
(V 57 C 287)

(From Assam and Nagaland)

M. HIDAYATULLAH, C J, A N. RAY
AND I. D. DUA, JJ.

State of Assam, Appellant v Abdul
Noor and others, Respondents

Criminal Appeal No 20 of 1968, D/-
13-3-1970

DN/DN/B416/70/DHZ/D

(A) Constitution of India, Article 134 (1)
(c) — Certificate of fitness — High Court must be satisfied that the appeal involves some substantial question of law.

The right to appeal to the Supreme Court in criminal matters is regulated by Article 134. The power under sub-clause (c) conferred on the High Court discretion which is to be exercised on judicial principles. The jurisdiction under Article 134 (1) (c) is not that of an ordinary court of criminal appeal. Before granting a certificate under Article 134 (1) (c) the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication what substantial question of law or principle is involved in the appeal to bring it within the scope of Article 134 (1) (c). Where the certificate is not in compliance with the requirements of Article 134 (1) (c) the Supreme Court will decline to accept it. However the Supreme Court after declining to accept the certificate can allow the appellant to apply under Article 136 in proper cases.

(Para 7)

(B) Constitution of India, Article 136 — Supreme Court declining to accept certificate under Article 134 (1) (c) can allow appellant to apply under Article 136, in proper cases.

(Para 7)

(C) Criminal P. C. (1898), Section 190 — Magistrate can ask for investigation under Section 156 (3) of the Code before taking cognizance.

The Magistrate can under Section 190 before taking cognizance, ask for investigation by the police under Section 156 (3). The Magistrate can also issue warrant for production before taking cognizance. If after cognizance has been taken, the Magistrate wants any investigation, it will be under Section 202 of the Code.

(Para 13)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1467 (V 52)=

1965-2 SCR 771= 1965 (2) Cri

LJ 539, Babu v State of U. P

7

The following Judgment of the Court was delivered by

RAY, J.:— This is an appeal by certificate under Article 134 (1) (c) of the Constitution against the judgment dated 22 December, 1966 of the High Court of Assam and Nagaland quashing proceedings in G. R. case No 683 of 1964 and G. R. case No. 701 of 1964.

2. The respondents made an application to the High Court for quashing G. R.

case No. 701 of 1964 pending in the Court of Additional District Magistrate, Silchar and G. R. case No. 683 of 1964 pending in the Court of the Magistrate, Tezpur.

3. G. R. case No. 701 of 1964 related to a complaint alleging that the respondent Jamurddin Ahmed, in collusion with a doctor and a nurse caused forcible abortion on a minor girl.

4. The other case G. R. No. 683 of 1964 related to a complaint filed by one Sabitri Das alleging that her minor daughter was employed as a maid-servant in the house of the respondent Jamurddin Ahmed and was forcibly given in marriage to a Muslim.

5. The High Court quashed both the proceedings on the ground that the Magistrate sent the complaint petitions to the officer-in-charge of the police station for investigation without examining the complainant.

6. In the application for leave to appeal to this Court the State submitted, inter alia, in the grounds of appeal that the High Court erred in law by quashing the proceedings on the ground that the complainant was not examined. The High Court passed an order stating that the certificate applied for is granted in the circumstances of the case.

7. The right to appeal to this Court in criminal matters is regulated by Article 134. In the present case, we are concerned with sub-clause (c) and not sub-clauses (a) and (b) of clause (1) of Article 134. The scope of sub-clause (c) of clause (1) of Article 134 has been considered in several decisions of this Court and we shall refer only to the last one. In *Babu v. State of Uttar Pradesh*, 1965-2 SCR 771= (AIR 1965 SC 1467) this Court said that the power under sub-clause (c) conferred on the High Court discretion which is to be exercised on judicial principles. The jurisdiction under Article 134 (1) (c) is not that of an ordinary Court of Criminal appeal. It is manifest that before granting a certificate under sub-clause (c) the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication what substantial question of law or principle is involved in the appeal to bring it within the scope of Article 134 (1) (c). Where this Court has found that the certificate is not in compliance with the requirements of Article 134 (1) (c), it has declined to accept the certificate. There are instances

where however this Court after declining to accept the certificate has allowed the appellant to apply under Article 136 in proper cases.

8. In the present case the certificate does not indicate any reason as to why the High Court granted the certificate. The jurisdiction of this Court is attracted by reason of this certificate. We decline to accept the certificate in the present case.

9. The complainants Satindra Mohan Deb and T. P. Bhattacharjee both Members of the Legislative Assembly in G. R. case No. 701 of 1964 complained to the Additional Deputy Commissioner, Cachar, Silchar on 10th July, 1964 that a Hindu girl brought from Tezpur and living in the family of Jamurddin, Executive Engineer, conceived and while in an advanced stage of pregnancy was stealthily removed to the Civil Hospital in collusion with Dr. Noshaid Ali and a nurse and they caused a forcible abortion on the girl and thereafter removed the girl to an unknown destination. On 11th July, 1964, Amina Khatoon the girl in question made a statement that she was a maid-servant of Jamurddin Ahmed. Her mother married someone after the death of her father. She was brought up by Asmat Ali. She was recruited as maid-servant by Ahmed. In the winter of 1963 she married one Noor and she lived with her husband and conceived a child by her marriage. She was taken to the hospital after profuse bleeding. She was no longer in a stage of pregnancy. She wanted to go back and live at the house of her master.

10. It is also in evidence that when Amina was working at the house of Jamurddin Ahmed, Engineer, Asmat Ali wrote letters both to Ahmed and his wife that they were taking good care of Amina. Amina was the adopted daughter of Asmat Ali. Asmat Ali married the elder sister of Amina's mother Sabitri. Asmat Ali affirmed an affidavit on 12th September, 1964, that Amina's mother Sabitri had married Gopesh Nath and Amina who was called Lakhi was born to Gopesh Nath in or about the year 1943. After the death of Gopesh Nath, Sabitri lived with Cheniram son of her father Nilkanta's brother. Lakhi was not able to pull on well with her mother. Sabitri gave Lakhi to Asmat Ali and his wife Swadeshi. Lakhi was then given the name of Amina. In 1962 Amina was employed in the service of Ahmed. Amina was married to Abdul Noor. This affidavit was affirmed

by Asmat Ali on 12th September, 1964 in answer to the complaint filed by Amina's mother Sabitri that Jamurddin Ahmed, Executive Engineer had married her daughter by changing her name.

11. The complaint as to forcible abortion is completely repelled by the affidavit of Amina herself that she married Noor and conceived by him and thereafter there was a miscarriage.

12. The complaint of Amina's mother Sabitri that Amina had been given in marriage to a Muslim by conversion is utterly baseless by reason of the affidavit of Asmat Ali that Amina had been taken in adoption by Asmat Ali and then given in marriage to Noor.

13. In the present case, it is not necessary to go into the question as to whether cognizance was taken without examination of the complainant. The Magistrate can under Section 190 of the Criminal Procedure Code before taking cognizance ask for investigation by the police under Section 156 (3) of the Criminal Procedure Code. The Magistrate can also issue warrant for production before taking cognizance. If after cognizance has been taken, the Magistrate wants any investigation, it will be under Section 202 of the Criminal Procedure Code. The investigation which was ordered in the present case elucidated facts as to the marriage of Amina Khatoon whereupon it is clear the complaints do not disclose any offence.

14. No useful purpose can be served by allowing these cases to be proceeded with. Both the cases appear to typify the tale of a woman who is lawfully married and the complaints are baseless and do not disclose any offence.

15. The appeal, therefore, fails and is dismissed.

Appeal dismissed.

1970 CRI. L. J. 1266 (Vol. 76, C. N. 325) =
AIR 1970 SUPREME COURT 1372 (V 57 C 289)

(From. Punjab and Haryana)

A. N. RAY AND I. D. DUA, JJ.

Chaman Lal, Appellant v. The State of Punjab, Respondent.

Criminal Appeal No 138 of 1967, D/- 6-3-1970.

(A) Penal Code (1860), Section 499 — Defamation — Good faith and bona fide — Proof.

DN/DN/B191/70/CWM/C

In order to establish good faith and bona fide it has to be seen first the circumstances under which the letter was written or words were uttered, secondly, whether there was any malice; thirdly, whether the accused made any enquiry before he made the allegations; fourthly, whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the accused acted in good faith. (Para 10)

(B) Penal Code (1860), Section 499 First Exception — Defamation — Exception — Imputation of truth for public good — Truth of imputation and publication of imputation for public good must be proved by accused. (Para 15)

(C) Penal Code (1860), Section 499 Ninth Exception — Defamation — Exception — Imputation for protection of interest — Interest of the person has to be real and legitimate when communication is made. (Para 17)

(D) Evidence Act (1872), Section 124 — Official communications — Privilege — Extent.

A privilege extends only to a communication upon the subject with respect to which the privilege extends and the privilege can be claimed in exercise of the right or safeguard of the interest which creates the privilege. (Para 18)

(E) Penal Code (1860), Section 500 — Punishment for defamation — Conviction of President of Municipal Committee — Facts found by Courts dispelling any semblance of good faith and on the contrary indicating lack of prudence and dignity with which a person occupying the office of President should act — Reduction of simple imprisonment from three months to two months so that it would save him from disqualification for continuing as President of the Municipality held not warranted. (Para 20)

The following Judgment of the Court was delivered by

RAY, J.:— This appeal is by special leave from the judgment of the High Court of Punjab and Haryana dated 26th May, 1967.

2. The High Court upheld the conviction of the appellant under Section 500 of the Indian Penal Code and sentenced him to three months simple imprisonment and imposed a fine of Rs. 1000/- and in default thereof a further simple imprisonment for three months.

3. The case started on a complaint filed by Bishan Kaur on 23rd October,

1963. The complaint was that the appellant Chaman Lal who was at that time President of Municipal Committee, Sujampur in the District of Gurdaspur had made defamatory remarks against her character at a public meeting held at Sujampur on 29th July, 1962 and that he further wrote a letter on 2nd August, 1962 to the Civil Surgeon, Gurdaspur which contained defamatory statements against her character and further that on 27th August, 1962 the appellant repeated those defamatory allegations before the Civil Surgeon.

4. The appellant pleaded justification under Exceptions 1, 8 and 9 to Section 499 of the Indian Penal Code. The First Exception states that it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact. The Eighth Exception states that it is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation. The Ninth Exception states that it is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

5. The letter written by the appellant dated 2nd August, 1962 which was marked as Exhibit P. W. 4/A, inter alia, states,

"It is a matter of grave concern and consideration that Smt. Bishan Kaur, Nurse Dai attached with Civil Dispensary is earning very bad reputation having illegal relations with one Shri Prakash Chand, a cycle repairer of Sujampur. A meeting of the Co-ordinate Civic-body of Sujampur was convened, to create civic sense on 29th July at 8 A. M. in the Town Hall wherein leading men of all communities were present. The issue about the character of Smt. Bishan Kaur was discussed in open house and the public felt this point seriously. The matter has been brought to the notice of the worthy Deputy Commissioner, Gurdaspur personally by me on 1st August, 1962 and he assured to take immediate action against her. I feel my assumption to bring to your notice and request for immediate transfer of her in the public interest".

6. The appellant claimed that the resi-

dents of Ward-5 of Sujampur had submitted a complaint in writing dated 25th July, 1962, against the serious misbehaviour of the respondent Bishan Kaur and that allegations were made against the character of Bishan Kaur in that application. The appellant further claimed that the said application marked Exhibit D. W. 1/A was read by the Secretary of the Municipal Committee, Sujampur at the meeting on 29th July, 1962. The further defence of the appellant was that a resolution was passed at that meeting requesting the appellant to approach the higher authorities regarding the said application and it was pursuant to that resolution that the appellant wrote the letter dated 2nd August, 1962 forming the subject-matter of the complaint. The resolution on which the appellant relied was marked as Exhibit D. C.

7. Counsel for the appellant contended that good faith of the appellant was established by two features; first that as President he had to act in public interest, and, secondly, large number of people who signed the application and passed the resolution were present at the meeting on 29th July, 1962 and there were allegations against the respondent. It was, therefore, said by counsel for the appellant that the appellant acted not only in good faith but also for public good.

8. Public good is a question of fact. Good faith has also to be established as a fact.

9. The concurrent findings of fact by the Sessions Court and the High Court with regard to meeting on 29th July, 1962, are three-fold; first that there was no record of the proceedings of the meeting alleged to have been held on 29th July, 1962 at the Town Hall of Sujampur. It was not therefore dependable to rely only on the oral evidence of the complainant that the appellant had defamed the complainant at the meeting, and, therefore, benefit of doubt was given to the appellant on that charge. The second finding is that the application dated 29th July, 1962, alleged to have been made by the residents of Sujampur and further alleged to have been read over by the Secretary of the Municipal Committee at the meeting on 29th July, 1962, was a manufactured document. Thirdly, the resolution alleged by the appellant to have been passed by the residents of Sujampur at the meeting on 29th July, 1962, was also a forged document. One of the reasons given by both the Courts for rejecting

both the application and the resolution from consideration was that none of these alleged documents was put to any of the prosecution witnesses some of whom admittedly attended the meeting on 29th July, 1962. The genuineness of the documents was rightly disbelieved.

10. In the background of these findings of fact the plea of good faith of the appellant that he wrote the letter dated 2nd August, 1962, pursuant to the application and the resolution of the residents of Sujampur loses all force and has no foundation. In order to establish good faith and bona fide it has to be seen first the circumstances under which the letter was written or words were uttered, secondly, whether there was any malice; thirdly, whether the appellant made any enquiry before he made the allegations, fourthly, whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the appellant acted in good faith.

11. The appellant said that he verified the allegations and then wrote the letter forming the subject-matter of the complaint. The appellant has not given any evidence as to what steps he took for verifying the allegations. On the contrary, it appears to be established on evidence that during five years preceding the letter written by the appellant to the Civil Surgeon there was not a single instance or occasion of any complaint against the respondent Bishan Kaur. The further finding is that the appellant in defence sought to produce witnesses who tried to establish that the respondent was a woman of doubtful virtues. Three of the witnesses on behalf of the appellant were a potato chop seller, a tongawala and a petty shop-keeper and they went to the extent of saying that they had illicit connection with her. These defence witnesses were disbelieved. That also proved that the appellant did not act in good faith. The appellant was the President of the Municipal Committee and it would not be an act of good faith or prudence and caution to rely on such persons as a tongawala or a petty shop-keeper in making allegations against the character of the respondent.

12. Counsel for the appellant relied on Exhibits D. A. and D. B. and submitted that the High Court did not take these two letters into consideration in finding out the good faith of the appellant. Exhibit D. A. is dated 18th Sep-

tember, 1962 and is a letter addressed by the Civil Surgeon to the appellant. Exhibit D. B. is a memorandum by the residents of Sujampur to the Civil Surgeon and bears the date 27th August, 1962. In Exhibit D. B. the alleged signatories wrote to the Civil Surgeon that they had to attend the enquiry by the Civil Surgeon into the conduct of Bishan Kaur and that the enquiry was at the demand of the general public and further that there were complaints against the respondent and it was not desirable to retain such a person on the noble job of a nurse. The letter of the Civil Surgeon dated 1st September, 1962, was that a large number of people were present and bulk of them expressed their views against Bishan Kaur and some of the persons met the Civil Surgeon subsequent to the enquiry at his office. The High Court found that some of the persons who submitted the alleged representation against the respondent to the Civil Surgeon later on controverted the allegations against the respondent and this evidence established that the complainant was an ordinary nurse and that is how the appellant had manoeuvred discussion of the complainant's character at the enquiry before the Civil Surgeon on 27th August, 1962.

13. The appellant cannot rely on Exhibit D. B. dated 27th August, 1962 to establish good faith in writing the letter dated 1st August, 1962. Furthermore, Exhibit D. B. which is alleged to have been written by the residents of Sujampur was not proved by calling persons who are alleged to have signed. Documents do not prove themselves. Exhibit D. B. was not proved by the persons who are alleged to have signed the same nor was the truth of statements contained in Exhibit D. B. proved. The enquiry made by the Civil Surgeon on 27th August, 1962, was found by the High Court to have been engineered by the private animus of the appellant against the respondent by sending some residents to the place of enquiry. This finding not only disproves good faith but establishes total lack of care and prudence on the part of the appellant.

14. The letter written by the appellant indicates that the appellant was setting his seal of approval to matters contained in that letter. There is no proof that the appellant made any enquiry about the matters before he wrote the letter. There is no evidence that the appellant acted with reasonable care. On the contrary, circumstances suggest that

the appellant acted without any sense of responsibility and propriety. The appellant was a President of the Municipal Committee and therefore he was required to act with utmost prudence and caution.

15. In order to come within the First Exception to Section 499 of the Indian Penal Code it has to be established that what has been imputed concerning the respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the imputation and the publication of the imputation for the public good is on the appellant. The appellant totally failed to establish these pleas. On the contrary, the evidence is that the imputation concerning the respondent is not true but is motivated by animus of the appellant against the respondent.

16. The Eighth Exception to Sec. 499 of the Indian Penal Code indicates that accusation in good faith against the person to any of those who have lawful authority over that person is not defamation. We have already expressed the view that there is utter lack of good faith in accusation.

17. The Ninth Exception states that if the imputation is made in good faith for the protection of the person making it or for another person or for the public good it is not defamation. There is no evidence whatever to support the plea that the imputation was for the public good. The accusation was not also made in good faith. Good faith requires care and caution and prudence in the background of context and circumstances. The position of the person making the imputation will regulate the standard of care and caution. Under the Eighth Exception statement is made by a person to another who has authority to deal with the subject-matter of the complaint whereas the Ninth Exception deals with the statement for the protection of the interest of the person making it. Interest of the person has to be real and legitimate when communication is made in protection of the interest of the person making it.

18. Counsel for the appellant contended that the communication to the Civil Surgeon was privileged, because as the President of the Municipal Committee he had to write to the Civil Surgeon about the work of the complainant. It will be a question of fact as to what the duty of the appellant was in relation to

the work of the respondent in making a statement to the Civil Surgeon. This plea was not taken and there is no evidence to support it. Furthermore, the privilege extends only to a communication upon the subject with respect to which the privilege extends and the privilege can be claimed in exercise of the right or safeguard of the interest which creates the privilege. In the present case, the concurrent findings of fact repel any suggestion of protection of the interest of the appellant in making the insinuations contained in the letter forming the subject-matter of the complaint. There is also no material to show as to how the letter was written by the appellant in protection of his interest.

19. The letter written by the appellant contains imputations and insinuations against the character of the respondent. One of the allegations was that a cycle repairer was on intimate terms with the respondent. This was a serious allegation against the character of the respondent. The appellant made baseless and reckless allegations. They are baseless because they have not been proved. They are reckless because the appellant claimed to be the President of the Municipal Committee but he acted in a totally irresponsible manner by having gone out of his way to make the allegations against the character of a poor and helpless widow. The appellant was a man of power and wealth. That is all the more why he should have acted with restraint and decorum. He failed in both. There was no good faith. The appellant cannot be said to have acted in public good.

20. Counsel for the appellant submitted that if there was a reduction of sentence from three months to two months that would save him from disqualification. There is no merit in that submission. This is not a case where there should be a reduction of sentence particularly when the Courts have found facts which dispel any semblance of good faith and indicate on the contrary lack of prudence and dignity with which a person occupying the office of the President should act.

21. The appeal, therefore, fails and is dismissed. The appellant is directed to surrender to the bail bond to undergo the unexpired term of his imprisonment.

Appeal dismissed.

1970 CRI. L. J. 1270 (Vol. 76, C. N. 326)=
AIR 1970 SDPREME COURT 1331 JV 57 C 293)

(From: Allahabad)*

**J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.**

Lalta and others, Appellants v. The
State of U. P., Respondent.

Criminal Appeal No. 185 of 1966, D/-
25-10-1968.

**Criminal P. C. (1898), Section 403 —
Issue — Estoppel and autre fois acquit —
Distinction — Finding on issue of fact in
favour of accused bars reception of evi-
dence to disturb the finding in any subse-
quent trial of different offence permis-
sible under Section 403 (2). Judgment in
Cri. Revn. Applns. Nos. 410 and 413 of
1964, D/- 3-6-1966 (All), Reversed.**

Where an issue of fact has been tied
by a competent Court on a former occa-
sion and a finding of fact has been reach-
ed in favour of accused, such a finding
would constitute an estoppel or res judi-
cata against the prosecution, not as a bar
to the trial and conviction of the accused
for a different offence but as precluding
the reception of evidence to disturb that
finding of fact when the accused is tried
subsequently even for a different offence
which might be permitted by the terms
of Section 403 (2) Criminal P. C. Sec-
tion 403 does not preclude the applicabi-
lity of this rule of issue estoppel. Judgment
in Cri. Revn. Applns. Nos. 410 and 413
of 1964, D/- 3-6-1966 (All), Reversed. AIR
1956 SC 415 & AIR 1965 SC 87 & (1900)
2 QB 758 & 77 CLR 511 & 96 CLR 62
& 1950 AC 458, Rel. on. (Para 5)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 87 (V 52)=

(1964) 7 SCR 123, Manipur Ad-
ministration v. Thokchom Bira Singh 5

(1956) AIR 1956 SC 415 (V 43)=
1956 Cri LJ 805, Pritam Singh v.

State of Punjab 4, 5

(1950) 1950 AC 458 = 66 TLR

(Pt 2) 254, Sambasivam v. Public
Prosecutor, Federation of Malaya 5

(1900) 1900-2 QB 758= 69 LJQB

918, The Queen v. Ollis 5

96 CLR 62, Maiz v. The Queen 5

77 CLR 511, The King v. Wilkes 5

M/s. R. K. Garg, S. C. Agarwala, Miss
S. Chakravarti and Mr. S. S. Shukla, Advo-

* (Cri. Revn. Applns. Nos. 410 and 413 of
1964, D/- 3-6-1966 — All.)

CN/DN/F507/68/GGM/B

cates, for Appellants; M/s. O. P. Rana
and Ravindra Bana Advocate, for Respon-
dent.

The following Judgment of the Court
was delivered by

RAMASWAMI, J.: This appeal is
brought, by special leave, from the judg-
ment of the Allahabad High Court dated
June 3, 1966 dismissing the Criminal
Revision Applications Nos. 410 and 413
of 1964.

2. The appellant, Lalta filed a money
suit No 54 of 1955 in the Court of Civil
Judge, Gonda against Swami Nath on the
basis of a pronote and receipt dated July
1, 1952 on the allegation that Swami Nath
had taken a loan of Rs. 250 from him
and executed a promissory note and a
receipt in lieu thereof. Swami Nath filed
a written statement in that suit denying
to have taken any loan or to have exe-
cuted any pronote and receipt in favour
of Lalta. It appears that prior to the
institution of this suit Swami Nath had
filed a complaint on January 24, 1955
against Lalta and others alleging that
they had forcibly taken his thumb im-
pressions on a number of blank forms of
pronotes and receipts. The case arising
out of the Criminal complaint came to
be heard by a Magistrate Second Class
who by his judgment dated May 31, 1956
acquitted Lalta and the other persons com-
plained against. The Criminal case against
Swami Nath proceeded on the charges
framed under Sections 342 and 384,
Indian Penal Code. In the Civil Suit
which was filed by Lalta, the defendant
Swami Nath moved an application for a
report being called from the Superinten-
dent, Security Press, Nasik regarding the
year of the revenue stamps affixed on
the pronote and the receipt. The matter
was accordingly referred to the Superin-
tendent, Security Press, Nasik and the
report received was that the stamps in
question had been printed on December
21, 1953 and were issued for the first
time on January 16, 1954 to the Treasury.
Subsequent to the receipt of the report
Lalta did not put in appearance and the
suit was dismissed for default on June 1,
1956. The Civil Judge was moved for
filing a complaint against the appellants
for committing forgery. The Civil Judge
Gonda actually filed a complaint on
November 9, 1956 against Lalta for of-
fences under Sections 193, 194, 209, 465,
467 and 471, Indian Penal Code and
against Tribeni and Ram Bharosey for
an offence under Section 193, Indian

Penal Code. The complaint was enquired into by a First Class Magistrate who committed the appellants to the Court of Session. By his judgment dated November 27, 1963, the Assistant Sessions Judge, Gonda convicted Tribeni and Ram Bharosey under Section 467 read with Section 109, Indian Penal Code and sentenced them to 3 years rigorous imprisonment. He found Lalta guilty under Section 467, Indian Penal Code and sentenced him to 3 years rigorous imprisonment. Lalta was also convicted under Sec. 471, Indian Penal Code and sentenced to 2 years rigorous imprisonment. He was also found guilty under Section 193, Indian Penal Code and sentenced to rigorous imprisonment for two years. The appellants took the matter in appeal to the Sessions Judge, Gonda who by his order dated October 17, 1964 set aside the conviction of Lalta under Section 193, Indian Penal Code but maintained the conviction of the appellants under the other sections. Tribeni Lalta and Ram Bharosey filed Revision Applications before the Allahabad High Court which by its order dated June 3, 1966 affirmed the order of the Sessions Judge, Gonda and dismissed the Revision Applications.

3. In support of this appeal Mr. Garg put forward the argument that in view of the fact that Swami Nath's complaint had been dismissed by the Second Class Magistrate on May 31, 1956, the prosecution case with regard to the act of forgery must fail and the conviction of Lalta under Sections 467 and 471, Indian Penal Code was not sustainable. It was also pointed out that the charge of abetment against Ram Bharosey and Tribeni under Section 467 read with Section 109, Indian Penal Code and Section 471 read with Section 109, Indian Penal Code must fail for the same reason. In our opinion, the argument put forward on behalf of the appellants is well founded and must be accepted as correct.

4. In *Pritam Singh v. The State of Punjab*, AIR 1956 SC 415 it was pointed out by this Court that the effect of a verdict of acquittal passed by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence but to that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. In that case, the appellant had been acquitted of the charge under Section 19 (f), Arms Act for

possession of a revolver. There was a subsequent prosecution of the appellant for an offence under Section 302, Indian Penal Code and the possession of the revolver was a fact in issue in the later case which had to be established by the prosecution. It was held that the finding in the former trial on the issue of possession of the revolver will constitute an estoppel against the prosecution, not as a bar to the trial and conviction of the appellant for a different offence but as precluding the reception of evidence to disturb the finding of fact.

5. Section 403, Criminal Procedure Code embodies in statutory form the accepted English rule of *autre fois acquit*. The section reads as follows:

"403. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sec. 236, or for which he might have been convicted under Section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Sec. 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall effect the provisions of Section 26 of the General Clauses Act, 1897, or of Section 188 of this Code.

Explanation.—The dismissal of a complaint, the stopping of proceedings under

Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section."

Section 26 of the General Clauses Act which is referred to in Section 403, Criminal Procedure Code enacts as follows:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

It is manifest in the present case that the appellants cannot plead the bar enacted in Section 403 (1) of the Criminal Procedure Code. It is equally manifest that the prosecution of the appellants would be permitted under sub-section (2) of Section 403, Criminal Procedure Code. The question presented for determination in this appeal is, however, different. The question is whether where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of S 403 (2), Criminal Procedure Code. The distinction between the principle of *autre fois* acquit and the rule as to issue-estoppel, in other words, the objection to the reception of evidence to prove an identical fact which has been the subject-matter of an earlier finding between the same parties is clearly brought out in the following passage from the judgment of Wright, J. in *The Queen v. Ollis*, (1900) 2 QB 758 at pp 768-769

"The real question is whether this relevant evidence of the false pretence on July 5, or 6 ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial, at which the prisoner was charged with having obtained money from Ramsey on that false pretence, and was acquitted of that charge."

Speaking of this type of estoppel, Dixon, J. stated in *The King v. Wilkes*, 77 CLR 511 at p 518.

"Whilst there is not a great deal of authority upon the subject, it appears to

me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wright, J. in *R. v. Ollis*, (1900) 2 QB 758 which in effect I have adopted in the foregoing statements There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue-estoppel should not apply. Such rules are not to be confused with those of *res judicata* which in criminal proceedings are expressed in the pleas of *autre fois* acquit and *autre fois* convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the re-litigation of issues which are settled by prior litigation."

The same question was the subject-matter of consideration by the High Court of Australia in a later case *Marz v. The Queen*, 96 CLR 62 at pp. 68-69. The question at issue was the validity of a conviction for rape after the accused had been acquitted on the charge of murdering the woman during the commission of the act. In a unanimous judgment by which the appeal of the accused was allowed, the High Court stated as follows:

"It is a negation in the alternative upon which, so long as the verdict stood in its entirety, the applicant was entitled to rely as creating an issue-estoppel against the Crown. He was entitled to rely upon it because when he pleaded not guilty to the indictment of murder the issues which were thereby joined between him and the Crown necessarily raised for determination the existence of the three elements we have mentioned and the verdict upon those issues must, for the reasons we have given, be taken to have affirmed the existence of the

third and to have denied the existence of one or other of the other two elements. It is nothing to point that the verdict may have been the result of a misdirection of the judge and that owing to the misdirection the jury may have found the verdict without understanding or intending what as a matter of law is its necessary meaning or its legal consequences. The law which gives effect to issue estoppels is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact; it does not matter that the finding may be thought to be due to the jury having been put upon the wrong track by some direction of the presiding judge or to the jury having got on the wrong track unaided. It is enough that an issue or issues have been distinctly raised and found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other."

It is therefore clear that Section 403, Criminal Procedure Code does not preclude the applicability of this rule of issue-estoppel. It was contended by Mr. Rana on behalf of the respondent that the decision of this Court in Pritam Singh's case, AIR 1956 SC 415 was based on the observations of the Judicial Committee in *Sambasivam v. Public Prosecutor, Federation of Malaya*, 1950 AC 458 and the decision in Pritam Singh's case, AIR 1956 SC 415 required reconsideration because the principle could have no application to India where the principle of *autre fois acquit* is covered by a statutory provision viz., Section 403, Criminal Procedure Code which must be taken to be exhaustive in character. We are unable to accept this contention as right. We have already pointed out that Section 403, Criminal Procedure Code does not preclude the applicability of the rule of issue-estoppel. In any event the rule is one which is in accordance with sound principle and supported by high authority and there are already two decisions of this Court, viz., Pritam Singh's case, AIR 1956 SC 415 and a latter case—*Manipur Administration v. Thokchom, Bira Singh*, (1964) 7 SCR 123 = (AIR 1965 SC 87)—which have accepted the rule as a proper one to be adopted. We therefore do not see any reason for casting any doubt

on the soundness of the rule or for taking a different view from that adopted in the two earlier decisions of this Court referred to.

6. If the rule of issue-estoppel is applied to the present case, it follows that the charge with regard to forgery must fail against all the appellants. The reason is that the case of Swami Nath is solely based upon the allegation that his thumb impressions were obtained on blank forms of promissory notes and receipts on January 7, 1955 by the use of force. If the finding of the Second Class Magistrate on this issue is final and cannot be reopened, the substratum of the present prosecution case fails and the charges of forgery under Sections 467 and 471, Indian Penal Code cannot be established against any of the appellants.

7. For these reasons we hold that this appeal must be allowed the judgment of the Allahabad High Court dated June 3, 1966 must be set aside and the convictions of each of the appellants and the sentence imposed upon them should be quashed. If the appellants are still in jail they should be set at liberty forthwith.

Appeals allowed.

1970 CRI. L. J. 1273 (Vol. 76, C. N. 327) =
AIR 1970 SUPREME COURT 1390
(V 57 C 296)

(From: Bombay)*

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Chandrakant Kalyandas Kakodkar, Appellant v. The State of Maharashtra and others, Respondents.

Criminal Appeal No. 170 of 1967, D/- 25-8-1969.

(A) Penal Code (1860), Section 292 — Obscene books etc. — Question of obscenity — Does not altogether depend on oral evidence but must be judged by the Court.

The question whether particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292. Even so

* (Cri. Appeal No. 805 of 1965, D/- 25-1966—Bom.)

as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though the verdict as to whether the book or article or story considered as a whole panders to the purient and is obscene must be judged by the Courts. (Para 4)

(B) Penal Code (1860), Section 292 — Obscene books etc. — Obscenity — Determination — Aspects to be considered by Court. Criminal Appeal No. 805 of 1965, D/- 25-10-1966 (Bom), on facts Reversed.

What is obscenity has not been defined either in Section 292, I. P. C. or in any of the Statutes prohibiting and penalising mailing, importing, exporting, publishing and selling of obscene matters. It is the duty of Court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are 'so likely to deprive and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary Society.

(Para 5)

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels stories and pieces of literature which have a content of sex, love and romance. In the field of art and cinema also the adolescent is shown situations which even a quarter of century ago would be considered derogatory to public morality, but having regard to changed conditions

are more taken for granted without in anyway tending to debase or debauch the mind. What the Court has to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or became depraved by reading it or might have impure and lecherous thoughts aroused in their minds. (1868) 3 QB 360 and AIR 1965 SC 881, Rel. on; Criminal Appeal No. 805 of 1965, D/- 25-10-1966 (Bom), on facts, Reversed. (Para 13)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 881 (V 52) =
1965 (2) Cri LJ 8, Ranjit D
Udeshi v. State of Maharashtra 5
(1868) 1868-3 QB 360 = 37 LJMC
89, R v. Hicklin 5

Mr. S. S. Kavalekar, Sr. Advocate (M/s. K. Rajendra Chaudhuri and K. R. Chaudhuri, Advocates with him), for Appellant, M/s H. R. Khanna, B. D. Sharma and S. P. Nayar, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.:— This appeal is by special leave directed against the judgment of the Bombay High Court.

2. The appellant is the author of a short story entitled Shama published in the 1962, Diwali Issue of Rambha, a monthly Marathi Magazine, which story is said to be obscene. Criminal proceedings were, therefore, initiated before the first class Magistrate, Poona by the complainant Bhide under Section 292, Indian Penal Code against the Printer and Publisher accused 1, the writer of the story accused 2 and the selling agent accused 3. The complainant stated that he had read the aforesaid Diwali issue of Rambha and found many articles and pictures in it to be obscene which are calculated to corrupt and deprave the minds of the readers in general and the young readers in particular. The complainant further referred to several other articles in the same issue such as the story of Savitri and certain cartoons but we are not now concerned with these because both the Magistrate as well the High Court did not think that they offended the provisions of Section 292, Indian Penal Code. The Magistrate after an exhaustive consideration did not find the accused guilty of the offence with which they were charged and, therefore, acquitted them. The complainant and the State filed appeals against this judgment of acquittal.

Before the High Court it was conceded that there was no evidence that accused No. 3 had sold any copies of the issues of Rambha and accordingly the order of acquittal in his favour was confirmed. In so far as the other two accused are concerned it reversed the order of acquittal and convicted the printer and publisher accused No. 1 and the writer accused No. 2 under Section 292, Indian Penal Code but taking into consideration the degree of obscenity in the passage complained of a fine of Rs. 25 only was imposed on each of the accused and in default they were directed to suffer simple imprisonment for a week. It was also directed that copies of the magazine Rambha in which the offending story was published and which may be in possession and power of the two accused be destroyed.

3. The allegation against the accused is that certain passages in the story of Shama at pp. 111-112, 114, 116, 118-121, 127, 128, 131 and 134 are said to be obscene. In support of this the complainant examined himself and led the evidence of Dr. P. G. Sahstrabudhe and Dr. G. V. Purohit in support of his allegation that the novel is obscene and that the writer and publisher contravened the provisions of Section 292, Indian Penal Code. Accused No. 1 stated that the story of Shama was written by an able writer which depicted the frustration in the life of a poet and denied that it was obscene. The writer Kakodkar, accused No. 2 claims to have written about 60 such stories which are published in different periodicals by reputed publishers. He also denies that Shama is obscene and states that he has introduced certain characters in order to condemn the worst and glorify the best and it was never his intention to titillate the sex feelings of the readers, but on the other hand his attempt was to achieve the literary and artistic standard which was in keeping with the style of some of the able and successful writers of Marathi literature. In support of his defence, he examined Shri Keluskar and Prof. Madho Manohar D. Ws. 1 and 2 respectively. The Court on its own summoned and examined Prof. N. S. Phadke and Acharya P. K. Atrc. Both the Magistrate as well as the learned Judge of the High Court were conversant with Marathi and they seem to have read the story of Shama in the original, an advantage which we have not got. However, on a consideration of the offending passages in the

story to which we shall refer presently, they came to different and opposite conclusions.

4. It is apparent that the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the Court to ascertain whether the book or story or any passage or any passages therein offend the provisions of S. 292. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the Courts and ultimately by this Court.

5. What is obscenity has not been defined either in Section 292, Indian Penal Code or in any of the statutes prohibiting and penalising, mailing, importing exporting, publishing and selling of obscene matters. The test that has been generally applied in this country was that laid down by Cockburn, C. J., in Hicklin's case (1868) 3 QB 360 and even after the inauguration of the Constitution and considered in relation to the fundamental right of freedom of speech and expression this test, it has been held, should not be discarded. In Hicklin's case, (1868) 3 QB 360 while construing statutes 20 and 21 Victoria, a measure enacted against obscene books, Cockburn, C. J., formulated the test in these words:

"I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands publication of this sort may fall. It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thought of most impure and libidinous character."

This Court has in *Ranjit D. Udeshi v. State of Maharashtra*, 1965-1 SCR 65= (AIR 1965 SC 881) considered the above test and also the test laid down in certain other American cases. *Hidayatullah, J.*, as he then was, at the outset pointed out that it is not easy to lay down a true test because "art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross." It was also pointed out in that decision at p. 74 (of SCR)=(at p. 887 of AIR).

"None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angles and saints of Michaelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act."

It is, therefore, the duty of the Court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary society. We can do no better than to refer to this aspect in the language of *Hidayatullah, J.*, at p. 76 (of SCR)=(at p. 888 of AIR).

"An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of

this sort and into whose hands the book is likely to fall."

Referring to the attempt which our national and regional languages are making to strengthen themselves by new literary standards after a deadening period under the impact of English, it was further observed at p. 77 (of SCR)=(at p. 889 of AIR),

"that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerise all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way."

Bearing in mind these observations and the tests laid down in *Udeshi's* case, (1965) 1 SCR 65= (AIR 1965 SC 881), we propose to examine, having regard to our national standards, the passages in *Shama* to ascertain in the light of the work as a whole whether they treat with sex in such a way as to be offensive to public decency and morality as can be considered likely to pander to lascivious, prurient or sexually precocious minds.

6. The second appellant writes about the life of a poet *Nishikant* who left school in the days of freedom struggle, wrote revolutionary poems, but as the freedom struggle waned he did not join school as others had done notwithstanding his brother's advice that he should pass the matric so that he could be employed in service. As he was mostly unemployed, he was living on his brother and on the bounty of his sister-in-law who was kind and considerate to him. *Nishikant*, it will appear, is emotional, sensitive and has the power to discern right from wrong. The story starts with his being employed as a teacher and his meeting *Shama*, the Music teacher in the school. His attraction for her and the opportunity she gives him to meet her alone in her room fills him with a sense of foreboding lest he may have to endure the pangs of suffering which he had to under-

go in his two earlier affairs with Neela and Vanita. The poet recalls these two affairs individually and we get the impression that the pain which he underwent should not be repeated. It is more as a repellent to any further involvement with Shama that these experiences are related.

7. Neela who is about 17 years of age is the daughter of a distant maternal cousin of his mother. As she had reached the marriageable age, her father in Goa, Wasudeo who always treated Nishikant's mother like his own sister is anxious to get her married to some eligible youngman, but evidently the opportunity for choosing the right person was remote. So he suggests to Nishikant's mother that Nishikant should come and bring Neela to Bombay to live with them where they would have better opportunity of choosing a youngman for her to be married. Nishikant who was appointed in a newspaper office was at first reluctant but his sister-in-law persuades him and so he goes to Goa. When he meets Neela, she had changed and was not as ugly as when he had seen her earlier. The author then depicts the slow but steady maturing of the love between them, the seeking of and getting of opportunities to be near to each other, their having to sleep in the same bed while on the boat coming to Bombay and ultimately falling in love with each other which developed during Neela's stay in Bombay. During Neela's stay with Nishikant's family the love between her and Nishikant became intense as a result Nishikant proposes to marry her and writes to her father for his consent. They wait for a reply but unknown to Nishikant, Neela receives a reply from her father rejecting the proposal on the ground that Nishikant is unemployed and would not join Government service even though he had suggested it to him. He says in that letter that poetry may bring him fame but would not give him a livelihood. As he was entirely dependant on his brother for his maintenance, the father refused to give his consent in the interest of Neela's happiness and told her that he was coming back to fetch her. As Neela was in love with Nishikant but she knew that she would not be married to him, she encourages him to bring their love to culmination. This state of affairs lasted for a few days before her father took her away. About two months later Nishikant receives an invitation card for Neela's marriage and thereafter he received

another letter written by Wasudeo to his daughter to which we have earlier referred and which also contained at the back of it Neela's message to Nishikant asking him to forget her.

8. Even after four years he was unable to forget Neela and had taken to drinking and coming home late. He was idle for long spells and whenever he thought of Neela he wrote a poem. Then one day he was introduced to Vanita who was a graduate and a married woman who had left her husband. She was a critic of stories and novels. When they met she had praised his poems and had invited him to come to her room ostensibly to discuss his poetry. Vanita is shown as an oversexed woman, experienced and forward, making advances and suggestions. Ultimately she and Nishikant have several affairs till one morning he finds that the person who had introduced her to him was coming out of her room and when he went in he found Vanita sleeping naked. His spirit revolted seeing her in that condition. He was greatly upset at her recalcitrance when he asked her how many more men she had. She replied that it had nothing to do with him, that he had got what he wanted and she does not want to be a slave to any person. He retorted with indignation that he did not wish to see her face and walked out. He had then made up his mind not to have any relations with any woman.

9. It was with such unpleasant experiences that when he met Shama and was attracted to her he was hesitating and avoiding meeting her alone but circumstances conspired to bring them together and again another affair developed between them. He encourages Shama to sing, writes lyrics for her songs and when she gives a performance in school he arranges for a radio and gramophone representatives to be present there. Her music was appreciated and she began to get audition from these sources. It appears one of the school teachers Kale had earlier attempted to make love to Shama and she had slapped him. When Kale informs Nishikant that he knows about his affairs with Shama, Nishikant gets angry and tells him that he knows how he was slapped by Shama for making advances to her. This enraged Kale and he seems to have taken his revenge by maligning the character of Shama to the Principal. As a result of this, the principal dismissed her. Hearing this, Nishikant gets angry, goes to the Headmaster

and accuses him of being an accomplice of Kale and leaves the service. He then persuades Shama to start a music school, later gets her engagements in films as a playback singer for which he was asked to write lyrics. Shama's reputation as a singer grows rapidly in the Marathi public. It was then that her uncle knowing of it comes to see her and makes insinuations against Nishikant who is offended and hurt because Shama does not prevent her uncle but listens to him without a demur. Periodical quarrels are witnessed because Shama becomes more status minded, begins to think of her wealth and position and moves into wealthy quarters all of which are against Nishikant's outlook and temperament. Both began to fall apart and the visits of Nishikant to Shama became rare. Even though Nishikant lives in poverty, he is too proud to ask her for money and is not willing to live with her on her conditions. He stays away from her, showing that he has pride, self respect and spirit of sacrifice. Suddenly a realisation comes to Shama that she had wronged Nishikant and that she owed everything to him, and therefore has an intense desire for reconciliation. In this state of affairs when she hears that he is taking part in the Kavi Samelan on the radio she gets into the car and asks her driver to drive fast to the radio station. On this pitch of expectant reconciliation and ultimate reunion the story ends

10. The story read as a whole does not, in our view, amount to its being a pornography nor does it pander to the prurient interest. It may not be of a very high literary quality and may show immaturity and insufficient experience of the writer, but in none of the passages referred to by the complainant do we find anything offending public order or morality. The High Court itself did not consider the description of Neela when Nishikant meets her in Goa (at p 107) objectionable, nor the narration and the description of the situation which is created for Nishikant and Neela on the way back to Bombay from Goa when for want of room they had to sleep on a single bed (p. 112) as obscene. The passages at pp 112, 114, 119-120 and 131 have been found by the High Court to come within the mischief of Section 292, Indian Penal Code. We have been taken through the corresponding passages in the English Translation and even allowing for the translation not bringing out the literary

or artistic refinement of the original language we find little in these passages which could be said to deprave or corrupt those in whose hands the book is likely to fall, nor can it be said that any of the passages advocates, as the High Court seems to think, a licentious behaviour depraving and corrupting the morals of adolescent youth. We do not think that it can be said with any assurance that merely because adolescent youth read situation of the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situation is given in a setting emphasising a strong moral to be drawn from it and condemns the conduct of the erring party as wrong and loathsome it cannot be said that they have a likelihood of corrupting the morals of those in whose hands it is likely to fall — particularly the adolescent.

11. In the passage at pp. 113-114 Nishikant takes Neela out to show the sights of the City of Bombay but instead takes her to a picture where after the lights go off, seeing a soldier and his girl friend in front kissing, they also indulge in kissing. Then as we said earlier, when the love between them develops Nishikant wanted to marry but the father of the girl was unwilling. Neela realising that their love could never be consummated encourages him to bring it to a culmination. In this way they enjoy unmarried bliss for a few days until Neela's father takes her away.

12. We agree with the learned Judge of the High Court that there is nothing in this or in the subsequent passages relating to Neela, Vanita and Shama which amounts to pornography nor has the author indulged in a description of the sex act or used any language which can be classed as vulgar. Whatever has been done is done in a restrained manner though in some places there may have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient to suggest to the adolescent anything which is depraving or lascivious. To the literate public there are available both to the adults and the adolescents innumerable books which contain references to sex. Their purpose is not, and they have not the effect of stimulating sex impulses in the reader but may form part of a work

of art or are intended to propagate ideas or to instil a moral.

13. The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescents and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow literatures and artists to give expression to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in Udeshr's case, if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore be judged from this aspect.

14. We do not think that any of the impugned passages which have been held by the High Court as offending Section 292, Indian Penal Code can be said to pervert the morals of the adolescent or be considered to be obscene. In this view, we allow the appeal, set aside the

conviction and fine. The fine if paid is directed to be refunded.

Appeal allowed.

1970 CRI. L. J. 1279 (Vol. 76, C. N 328) =
AIR 1970 SUPREME COURT 1396 (V 57 C 297)
(From Gujarat: (1968) 9 Guj LR 278)

J. C. SHAH, V. RAMASWAMI,
A. N. GROVER, JJ.

Bai Radha, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 1 of 1967, D/- 20-11-1968.

(A) Suppression of Immoral Traffic in Women and Girls Act (1956), Section 15 (1) — Power to search — Power is conferred by statute and not derived from recording of reasons — Omission to record reasons before or after search — Trial is not vitiated unless it is shown that prejudice is caused. (Para 5)

(B) Suppression of Immoral Traffic in Women and Girls Act (1956), Section 15 (1) and (2) — Search — Non-compliance with sub-sections (1) and (2) — It is mere irregularity — Trial is not vitiated unless it is shown that prejudice is caused by non-compliance — AIR 1965 Andh Pra 176, Overruled; (1968) 9 Guj LR 278, Affirmed. Case law discussed.

(Paras 5, 7)

(C) Criminal P. C. (1898), Section 537 — Section governs investigation, inquiry and trial of offences under Suppression of Immoral Traffic in Women and Girls Act (1956). (Paras 6, 7)

(D) Suppression of Immoral Traffic in Women and Girls Act (1956), Section 15 — Search — Non-compliance with Section 15 — It is irregularity curable under Section 537, Criminal P. C. (Paras 6, 7)

Cases Referred: Chronological Paras
(1965) AIR 1965 Andh Pra 176

(V 52)= 1965 (1) Cri LJ 543, Public Prosecutor Andhra Pradesh v. Nageswararao

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(1964) AIR 1964 SC 221 (V 51)=
(1964) 3 SCR 71= 1964 (1) Cri LJ 140, State of Uttar Pradesh v. Bhagwati Kishore Joshi

6, 7

(1962) AIR 1962 SC 63 (V 49)=
(1962) 2 SCR 694= 1962 (1) Cri LJ 106, Delhi Administration v. Ram Singh

5

(1960) AIR 1960 SC 210 (V 47)=
(1960) 1 SCR 991= 1960 Cri LJ

286, State of Rajasthan v. Rehman

5

(1955) AIR 1955 SC 196 (V 42)=
1955-1 SCR 1150= 1955 Cri LJ
526, H. N. Rishbud v. State of
Delhi

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Mr. B. Dattā, Advocate for M/s. J. B. Dadachanji and Co., for Appellant; M/s. H. R. Khanna and B. D. Sharma, Advocates, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.—The sole point which arises for decision in this appeal by special leave is whether the trial became illegal by reason of the search not having been conducted strictly in accordance with the provisions of Section 15 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act CIV of 1956), hereinafter called the "Act".

2. The facts need not be stated in detail. The appellant and two other persons were tried for various offences under the provisions of the Act, the charge substantially against her being that she was keeping a brothel in her house and knowingly lived on the earnings of the prostitution of women and girls. All the three accused persons were acquitted by the Magistrate. The State preferred an appeal to the High Court against the appellant and the third accused only. The High Court set aside the order of acquittal in respect of the appellant and convicted her for offences punishable under Sections 3 (1) and 4 (1) of the Act. She was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 200/-, (in default to suffer further rigorous imprisonment for six months) and to suffer rigorous imprisonment for six months on the second count, the sentences of imprisonment being concurrent.

3. The prosecution case was that on receiving complaints from several residents of the locality a raiding party was organised. The services of a decoy witness Kishan Taumal were requisitioned and he agreed to work as the punter. After ascertaining that he had no money he was given Rs. 8/- in all. That amount included a currency note of Rs. 5/- and three currency notes of Re. 1/- each, the numbers of notes having been noted down in the first part of the panchanama. The punter was instructed to hand over the amount for the charges that would have to be paid for having sexual intercourse with any girl or woman in the appellant's house. He was, however, only to engage himself in talk and not the actual act. A punch witness Prem Singh Hiraji was

also to accompany the raiding party. The raid was ultimately made according to the original plan and Kishan, the punter managed to engage a woman in conversation in a room in the house of the appellant. The raiding party found that she had opened the buttons of her blouse and she was found with her clothes in such a disordered condition that it was apparent that she was getting ready to have sexual intercourse with Kishan, but on seeing the police party she got up and dressed herself. The seven currency notes i. e., one five rupee note and two of one rupee currency notes were recovered from the appellant which were marked and which had been given by Kishan. Sub-sections (1) and (2) of Section 15 of the Act provide as follows:

"(1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a woman or girl living in any premises, and that such search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.

(2) Before making a search under sub-section (1) the special police officer shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them so to do."

What has been stressed greatly by learned counsel for the appellant is that the Act being a special Act its provisions should have been strictly followed. It is pointed out that the panch witness Prem Singh was not an inhabitant of the locality in which the place to be searched was situate. Another panch witness had also been taken who was a woman (Bai Shanta) to satisfy the requirement of sub-section (2) of Section 15 but she also was not an inhabitant of the locality where the house of the appellant was situate. It has been pointed out that in *Public Prosecutor, Andhra Pradesh v. Nageshwararao*, AIR 1965 Andh Pra 176 it was held by Sharfuddin Ahmed, J., that the Act being a special piece of legislation enacted with a specific purpose and the directions contained in Section 15 were mandatory. According to the learned Judge while the

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